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# ASSIGNATION.

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## SECTION 1.—DEFINITION.

1. An assignation is defined by Erskine<sup>1</sup> as “a written deed of conveyance by the proprietor to another of any subject not properly feudal.” Thus heritable rights when they are not perfected by seisin, or when they require no seisin—as servitudes, reversions, patronages, etc.—corporeal moveables, debts, and, generally, all incorporeal rights, may be transferred by assignation. The term is also applied to the transfer of property or rights which takes place in certain cases by operation of law, as, for example, by decree in a furthcoming, or by certain acts which are held equivalent to a written conveyance, such as indorsation of a bill of exchange.

## SECTION 2.—SUBJECTS ASSIGNABLE.

2. It is not all rights which are capable of assignation. Rights arising out of a contract which involves *delectus personæ* may not be assignable (*vide infra*), or the terms of a contract, as, for example, the contract of lease, may expressly or impliedly exclude assignees (see LEASE). ALIMENTARY RIGHTS (*q.v.*) may in general be assigned *quoad excessum*. A *spes successionis* is assignable before vesting has taken place, but the assignation will be operative only when the right vests;<sup>2</sup> and if an assignation in general terms is intended to carry a *spes successionis*, that intention should be clearly expressed.<sup>3</sup> An interest

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GENERAL AUTHORITIES.—Stair, iii. 1, and Note BB; Ersk. iii. 5; Bell, Com. v. chap. ii. s. 1; Bell, Prin. ii. 2, chap. ix.; Ersk. Prin. iii. 5; Anson, Contract, 15th ed., part iii. chap. ix; Addison, Contracts, 11th ed., 221; Gloag on Contract, 452.

<sup>1</sup> Inst. iii. 5, 1.

<sup>2</sup> *Wood v. Begbie*, 1850, 12 D. 963; *Trappes v. Meredith*, 1871, 10 M. 38; *Wyllie's Trs.* v. *Boyd*, 1891, 18 R. 1121; *Reid v. Morrison*, 1893, 20 R. 510.

<sup>3</sup> *M'Ewan's Trs.* v. *Macdonald*, 1909 S.C. 57.

under a revocable *mortis causa* deed, even although intimated, is not assignable until the death of the granter.<sup>1</sup>

### SECTION 3.—FORM OF ASSIGNATION.

3. A variety of styles of deeds applicable to the conveyance of different subjects will be found in the various style books.<sup>2</sup> The granter of an assignation is termed the *cedent*, the receiver the *assignee*, and sometimes the *cessionary*. In the old style the assignee was made mandatary and procurator *in rem suam*, the cedent “making and constituting” the assignee “his lawful cessioner and assignee in and to” the subject, and “surrogating and substituting” him in and to the cedent’s full right and place in the premises. In later practice the deed frequently assumed the form of a direct conveyance, and the cedent “assigned, conveyed, disposed, and made over” the subject to and in favour of the assignee. But words directly importing assignation or conveyance are not indispensable; any words giving authority or directions which, if fairly carried out, will operate a transference, are sufficient to effect an assignation.<sup>3</sup>

### SECTION 4.—TRANSMISSION OF MOVEABLE PROPERTY (SCOTLAND) ACT, 1862.

4. The Transmission of Moveable Property (Scotland) Act, 1862,<sup>4</sup> introduced a form of assignation which may be used by any party in right of a personal bond, or of a conveyance of moveable estate, and a form which may be written on the bond or conveyance itself. The words “bond” and “conveyance” are defined to include “personal bonds for payment or performance, bonds of caution, bonds of guarantee, bonds of relief, bonds and assignations in security of every kind, decreets of any Court, policies of assurance of any assurance company or association in Scotland,<sup>5</sup> whether held by parties resident in Scotland or elsewhere, protests of bills or of promissory notes, dispositions, assignations, or other conveyances of moveable or personal property or effects, assignations, translations, and retrocessions, and also probative extracts of all such deeds from the books of any competent Court”; and the words “moveable estate” are defined to include “all personal debts and obligations, and moveable or personal property or effects of every kind.” The form simply states the consideration, and assigns the bond or other deed described.

<sup>1</sup> *Bedwells v. Tod*, 2nd December 1819, F.C.

<sup>2</sup> *Juridical Styles*, 6th ed., vol. i. pp. 114 *et seq.*, 329 *et seq.*, 560; vol. ii. pp. 934 *et seq.*, 1537 *et seq.*; *Scots Style Book*, vol. i. pp. 424 *et seq.*

<sup>3</sup> *Bell*, Prin. 1461; *Carter v. McIntosh*, 1862, 24 D. 925; *Brownlee v. Robb*, 1907 S.C. 1302.

<sup>4</sup> 25 & 26 Vict. c. 85.

<sup>5</sup> The Policies of Assurance Act, 1867, introduced a simpler method of assignation of life policies available whatever the domicile of the assurance company. *Vide* INSURANCE (LIFE).



It is registrable in the books of any Court, in terms of any clause of registration contained in the bond or conveyance so assigned. When the assignee assigns the right to a third party, the deed is termed a "translation"; when he reassigns it to the cedent, it is termed a "retrocession." When the term "assignment" is used in the above Act, it includes "translations and retrocessions, and probative extracts thereof."<sup>1</sup> The Act provides that an assignment in statutory form, upon being duly stamped and duly intimated, shall have the same force and effect as a duly stamped and duly intimated assignment according to the forms in use at the date of passing of the Act, which in addition to a clause assigning the bond or other document of debt contained a clause surrogating and substituting the assignee in the cedent's full right and place.

5. The assignment of certain kinds of property and rights, such as patents, designs, trade-marks, copyrights, bills of exchange, bills of lading, ships, shares in companies, registered leases, etc., is regulated by particular statutes (*vide infra*).

#### SECTION 5.—INTIMATION.

6. When property or rights are transferred by assignment, intimation to the holder of the property or the debtor in the obligation is a necessary solemnity for the completion of the transfer.<sup>2</sup> There are two points in the doctrine of intimation—the interruption of *bona fides* on the part of the debtor, and the completion of the transference.<sup>3</sup> The most formal method of intimation is proper notarial intimation, attested by notarial instrument. The Act of 1862, while saving any form then in use,<sup>4</sup> provided that an assignment should be validly intimated (1) by a notary delivering a certified copy in presence of two witnesses, the evidence of which is a short certificate to that effect in statutory form; and (2) by the holder of the assignment, or anyone authorised by him, transmitting a copy, certified as correct, by post, to the person to whom intimation is to be made, a written acknowledgment of the receipt of the copy being evidence of intimation. An acknowledgment of intimation is usually a probative writ, but this is not essential.<sup>5</sup> Holograph acknowledgments have the privilege of proving their own date.<sup>6</sup>

7. But neither regular notarial intimation, nor intimation in the statutory form, are solemnities, and the law accepts in certain cases other forms of notice, or evidences of notice, which are regarded as

<sup>1</sup> Forms of translations and retrocessions will be found in the Juridical Styles, 6th ed., vol. ii. pp. 953 *et seq.* Scots Style Book, i. 437.

<sup>2</sup> Stair, iii. 1, 6.

<sup>3</sup> Bell, Prin. 1462.

<sup>4</sup> The forms in use prior to the commencement of the Act required that a notariaily certified copy of the assignment should be delivered to the debtor in the presence of a procurator for the assignee and two witnesses, followed by a somewhat elaborate notarial certificate of intimation, detailing the procedure followed.

<sup>5</sup> *Wallace v. Davies & Chambres*, 1853, 15 D. 688.

<sup>6</sup> *Earl of Selkirk v. Gray*, 1708, Mor. 4453; Robertson's App. 1.

equivalent or equipollent. Thus it is sufficient if there be judicial intimation, such as a charge upon a bond against a common debtor at the instance of the assignee, a citation of a common debtor by an assignee in an action for payment, or the lodging of a claim in a multipoleinding in which the debtor is a party.<sup>1</sup> The registration in the Register of Sasines of a heritable bond, or bond and disposition in security, granted by one not feudally vested, has been held sufficient intimation of the conveyance of a personal right in the lands.<sup>2</sup> But registration in the Books of Council and Session has no such effect.<sup>3</sup> So also, any act of the debtor undertaking to pay,<sup>4</sup> or corroborating the debt, is sufficient. Thus it is sufficient if the debtor is a party to the assignation, or if he acknowledge the assignee's right by letter, or pay interest or part of the principal to the assignee,<sup>5</sup> or if he accept a draft in favour of the assignee for the sum in a bond, or even if such a draft be presented and protested.<sup>6</sup> Intimation may be proved *rebus ipsis et factis*.<sup>7</sup> Mere private knowledge, though it may put the debtor in bad faith in a question with the assignee,<sup>8</sup> is not equivalent to intimation, and is of no avail in a competition with other properly completed assignations, legal or voluntary.<sup>9</sup> Where the debtor has a double capacity involving knowledge of an assignation, intimation may not in special circumstances be necessary.<sup>10</sup>

8. When the debtor is out of Scotland, intimation may presumably be made in the manner authorised by the Act of 1862, or it may be made edictally upon Letters of Supplement obtained in the Bill Chamber.<sup>11</sup> When there is more than one debtor, intimation must be made to each, *e.g.* where the uncalled capital of a company is assigned, intimation should be made to each shareholder.<sup>12</sup> Intimation to a firm should be made to all the partners, unless there is a regularly appointed manager; and the fact that the assignee was *de facto* manager of the firm has been held not equipollent to intimation to the firm.<sup>13</sup> Intimation to one of two trustees who held the trust funds, and practically administered the trust, has been held sufficient.<sup>14</sup> When an interest in a testamentary trust has been assigned, intimation to the law agents of the trust may be sufficient intimation to the trustees.<sup>15</sup> As regards

<sup>1</sup> *Dougall v. Gordon*, 17th November 1795, Mor. 851.

<sup>2</sup> *Paul v. Boyd's Trs.*, 1835, 13 S. 818; *Edmond v. Aberdeen Mags.*, 1855, 18 D. 47; *affd.* 3 Macq. 116; Ersk. iii. 5, 6; but see *Cameron's Trs. v. Cameron*, 1907 S.C. 407.

<sup>3</sup> *Tod's Trs. v. Wilson*, 1869, 7 M. 1100.

<sup>4</sup> *M'Gill v. Hutchison*, 1630, Mor. 860; *Earl of Selkirk v. Gray (supra)*.

<sup>5</sup> *Earl of Aberdeen v. Merchiston's Crs.*, 9th April 1730; Craig. & Stew. App. 44.

<sup>6</sup> *British Linen Co. v. Rainey's Tr.*, 1885, 12 R. 825.

<sup>7</sup> *Hill v. Lindsay and Ors.*, 1847, 10 D. 78.

<sup>8</sup> *Leith v. Garden*, 1703, Mor. 865.

<sup>9</sup> Bell, Com., M'L. ed., ii. 17.

<sup>10</sup> *Miller v. Learmonth (H.L.)*, 1870, 42 J. 418; *Browne's Tr. v. Anderson*, 1901, 4 F. 305.

<sup>11</sup> 6 Geo. IV. c. 120, s. 51; 1 & 2 Vict. c. 118; C.A.S., C. i. 4-6; Juridical Styles, 3rd ed., vol. iii. p. 379.

<sup>12</sup> *Liqr. of Union Club v. Edinburgh Life Assurance Co.*, 1906, 8 F. 1143; *Ballachulish Slate Quarries v. Menzies*, 1908, 45 S.L.R. 667.

<sup>13</sup> *Hill v. Lindsay and Ors.*, 1846, 8 D. 472. *Vide also Allan v. Urquhart*, 1887, 15 R. 56.

<sup>14</sup> *Jameson v. Sharp*, 1887, 14 R. 643.

<sup>15</sup> *Browne's Tr. v. Anderson, ut supra*.

an incorporated joint-stock bank, intimation should be made to the manager at the head office, and also to the agent of the branch where the money is, if it is lying at a branch. Intimation may be made to companies incorporated under the Companies Acts by delivering it at or posting it to the company at their registered office.<sup>1</sup>

#### SECTION 6.—TRANSFER WITHOUT DEED.

9. While an assignation is the appropriate deed for the transfer of moveables and incorporeal rights where writing is necessary, writing is not in all cases required. Thus (1) corporeal moveables, and certain classes of debts the right to which runs with the voucher (as bank bills and notes, and bills payable to the bearer and bills blank indorsed), are transferred, in the way either of sale or security, by mere delivery. In these cases delivery, with the intention to pass the property or create the security, is sufficient without any writing. But where moveables are in such a position that actual delivery cannot be made, as, for example, in the hands of a third party, then writing and intimation is necessary; and in certain cases, such as ships, after entry in the Registry of Shipping, writing is necessary on account of the title by which they are in law held and transferred.<sup>2</sup> (2) There are certain cases in which a deed of assignation is unnecessary, because the law recognises an equivalent. Thus the obligation contained in a bill of exchange or promissory note passes by indorsation. The acceptance of a bill, and, when the drawee has funds available for the payment thereof, the presentation of a bill, is equivalent to a duly intimated assignation.<sup>3</sup> Again, the indorsation and delivery of a bill of lading, by custom of merchants, passes the property of the goods which it represents,<sup>4</sup> and the assignation thus effected may be either an absolute transfer of the property, a conditional transfer, a mortgage or a pledge, according to the intention of the parties.<sup>5</sup> So also, where goods are represented by a document of title, the transfer of the document, coupled with intimation, completes the assignation. The expression "document of title" is defined by the Factors Act, 1889, and by the Sale of Goods Act, 1893, to include "any bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorising or purporting to authorise, either by indorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented."<sup>6</sup> The Factors Act

<sup>1</sup> Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 116. A corresponding provision is contained in the Companies Clauses Act (8 & 9 Vict. c. 17), s. 137; the Lands Clauses Act (8 & 9 Vict. c. 19), s. 128; and the Railway Clauses Act (8 & 9 Vict. c. 33), s. 130.

<sup>2</sup> See *post*.

<sup>3</sup> Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 53 (2). See BILL OF EXCHANGE.

<sup>4</sup> *Lickbarrow v. Mason*, 1794, 5 T.R. 683. <sup>5</sup> *Sewell v. Burdick*, 1884, L.R. 10 A.C. 74.

<sup>6</sup> Factors (Scotland) Act, 1890 (53 & 54 Vict. c. 40), s. 1; Factors Act, 1889 (52 & 53 Vict. c. 45), s. 1 (4); Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62.



also provides that, for its purposes, the transfer of a document of title may be by indorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery. In the case of bills of exchange and bills of lading, indorsation and transfer of the document is a complete assignation of the rights represented by the document, without any intimation. In the case of other documents of title, intimation of the transfer is necessary to complete the right of the transferee.<sup>1</sup>

#### SECTION 7.—ASSIGNATIONS REQUIRING NO INTIMATION.

10. While intimation is requisite for the completion of the transfer of property or rights conveyed by an assignation, in the sense of a deed of conveyance, there are certain assignations in the secondary sense, *i.e.* transfers of property from one person to another, which require no intimation. The cases of bills of exchange and bills of lading have already been noticed. The rule in these cases is founded upon the law merchant, and has its origin in the convenience of traders. There is another class of assignations which require no intimation, namely, legal or judicial assignations, these being in themselves public. Thus the act and warrant of a trustee in a sequestration vests in him the moveable estate and effects of the bankrupt, as if actual possession had been obtained or intimation made,<sup>2</sup> subject to the limitations imposed by the Conveyancing (Scotland) Act, 1924.<sup>3</sup> So also a decree of adjudication, although no seisin had followed upon it, was held preferable to a subsequent arrestment.<sup>4</sup> But legal assignations, although preferable in a competition, do not without intimation put the debtor in the obligation in bad faith; and a debtor who, without knowledge of the legal assignation, pays to the original creditor, will not be liable in a second payment.<sup>5</sup>

#### SECTION 8.—EFFECT OF ASSIGNATION.

11. The effect of a completed assignation is to divest the cedent and to put the assignee in his place, so that (1) the debtor cannot plead compensation on a debt of the cedent acquired after intimation of an assignation; (2) every right competent to the cedent is competent to the assignee; and (3) every defence competent against the cedent is competent against the assignee.<sup>6</sup> This rule is usually expressed in the maxim, *Assignatus utitur jure auctoris*. The assignee may sue or do diligence either in his own name, or in that of the cedent, if he be alive.

<sup>1</sup> *Connal & Co. v. Loder*, 1868, 6 M. 1095, L.J.-C. Inglis, 1110; *Inglis v. Robertson & Baxter*, 1898, 25 R. (H.L.) 70.

<sup>2</sup> Bankruptcy (Scotland) Act, 1913 (3 & 4 Geo. V. c. 20), ss. 44 and 97.

<sup>3</sup> 14 & 15 Geo. V. c. 27, s. 44.

<sup>4</sup> *L.J.-Clerk v. Fairholm*, 1671, Mor. 2766.

<sup>5</sup> Bell, Prin. 1467.

<sup>6</sup> *Shiells v. Ferguson, Davidson & Co.*, 1874, 4 R. 250; *Johnstone-Beattie v. Dalzell*, 1868, 6 M. 333.



But he cannot execute in his own name diligence issued in the name of the cedent.<sup>1</sup>

12. To the general rule, however, as to the effect of assignments there are certain exceptions to be noted. Where the defence competent against the cedent can only be established by reference to his oath, such reference is incompetent after assignment,<sup>2</sup> unless (1) the subject conveyed has been rendered litigious before intimation, as, for example, by an action brought by the debtor against the cedent;<sup>3</sup> or (2) the assignment be gratuitous or in trust for the cedent.<sup>4</sup> Again, the nature of the original contract under which the obligation assigned arises may be such as to bar the debtor from pleading against an assignee a defence pleadable against the cedent.<sup>5</sup> By the Sale of Goods Act, 1893,<sup>6</sup> it is enacted that "where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien, or retention, or stoppage *in transitu*, is defeated; and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien, or retention, or stoppage *in transitu*, can only be exercised subject to the rights of the transferee."

13. The rule that exceptions grounded on latent trusts or equities in favour of third parties, though pleadable against the cedent, will not be effectual against onerous assignees,<sup>7</sup> is not an exception to the rule, *Assignatus utitur jure auctoris*, for that rule only applies in questions arising between the debtor and the assignee, and not to questions between the debtor and third parties.<sup>8</sup> But such exceptions are good against the cedent, his gratuitous assignees, his creditors, and his trustee in bankruptcy, for these take the subject *tantum et tale* as it stood in the cedent.<sup>9</sup> A trustee for general creditors, whether by voluntary conveyance from the bankrupt, or taking right under the Bankruptcy

<sup>1</sup> *Stewart v. Hay*, 1745, Mor. 834 and 3689.

<sup>2</sup> *Campbell v. Campbell*, 1860, 23 D. 159.

<sup>3</sup> *Somerville*, 1673, Mor. 8325. As to Notices of Litigiosity, see 14 & 15 Geo. V. c. 27, s. 44.

<sup>4</sup> *Ersk. Inst.* iii. 5, 10; *Knox v. Martin*, 1850, 12 D. 719.

<sup>5</sup> An example of the application of this principle will be found in *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, 1877, L.R. 5 Ch. D. 205. There vendors of steel rails, who had issued to the purchasers warrants for the goods deliverable to the purchaser or assigns by indorsement, which were, by usage of trade and the intention of the parties, meant to be transferable to holders for value free from any vendor's lien, were held not entitled to plead vendor's lien for unpaid purchase money against third parties to whom the warrants had been indorsed in pledge by the purchasers. See also *In re Agra & Masterman's Bank*, *Ex p. Asiatic Banking Corporation*, 1867, L.R. 2 Ch. App. 391; *In re Blakely Ordnance Co.*, *Ex p. New Zealand Banking Corporation*, 1867, L.R. 3 Ch. App. 154; *Webb and Ors. v. Commissioners of Herne Bay*, 1870, L.R. 5 Q.B. 642; *Crouch v. Credit Foncier of England, Ltd.*, 1873, L.R. 8 Q.B. 374; *Clavering, Son & Co. v. Goodwins, Jardine & Co.*, 1891, 18 R. 652.

<sup>6</sup> 56 & 57 Vict. c. 71, s. 47.

<sup>7</sup> *Redfearn v. Ferrier*, 1813, Mor. Pers. & Real, App. No. 3; 1 Dow, 50; 5 Pat. 707.

<sup>8</sup> *Scottish Widows' Fund v. Buist*, 1876, 3 R. 1078.

<sup>9</sup> *Dingwall v. McCombie*, 1822, 1 S. 463; *Gordon v. Cheyne*, 1824, 2 S. 675; *Fleeming v. Houden*, 1868, 6 M. (H.L.) 113; *Graeme's Tr. v. Giersberg*, 1888, 15 R. 691; *Livingstone v. Allans*, 1900, 3 F. 233.

Acts, cannot plead the equities competent to an onerous assignee. But the phrase *tantum et tale* is to be applied only with regard to equities qualifying or limiting the title of the cedent, such as that his title is that of a trustee, and not to mere personal obligations, such as are constituted by uncompleted assignments or dispositions of his property.<sup>1</sup> Such uncompleted assignments or dispositions will not, it is thought, prevail against an assignment in favour of a trustee for creditors which has been completed by intimation, or the act and warrant of a trustee in sequestration which is equivalent to a completed assignment.<sup>2</sup>

#### SECTION 9.—WARRANTICE.

14. Assignment of a debt implies warrantice that the debt is due and the title to assign good, but not that the debtor is solvent.<sup>3</sup>

#### SECTION 10.—ASSIGNATION OF CONTRACTS.

15. While rights acquired by contract are assignable, contracts involving mutual obligations and *delectus personæ* cannot be assigned. Thus, when A. enters into such a contract with B., he cannot assign that contract to C. to the effect of giving C. a right to perform the contract and sue for the price.<sup>4</sup> An exception to this rule exists under statute in the case of bills of lading. By the Bills of Lading Act, 1855,<sup>5</sup> “every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property of the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to him and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.” A party to a contract which does not involve *delectus personæ* may perform it by the hand of another, the obligations and rights of action under the contract remaining in his own person,<sup>6</sup> or he may assign the contract.<sup>7</sup>

<sup>1</sup> *Heritable Reversionary Co., Ltd. v. Millar*, 1892, 19 R. (H.L.) 43.

<sup>2</sup> See *Napier & Ettrick's Tr. v. Lord de Saumarez*, 1900, 2 F. 882.

<sup>3</sup> Ersk. ii. 3, 25; *Riddell v. Whyte*, 1707, Mor. 16616; *Ferrier v. Graham's Trs.*, 1828, 6 S. 818; *Sinclair v. Wilson & Maclellan*, 1829, 7 S. 401; *Reid v. Barclay*, 1879, 6 R. 1007.

<sup>4</sup> *Boulton v. Jones*, 1857, 2 H. & N. 564; *Robson v. Drummond*, 1831, 2 B. & A. 303; *In re Family Endowment Society*, 1870, L.R. 5 Ch. App. 118; *Grierson, Oldham & Co., Ltd. v. Forbes, Maxwell & Co., Ltd.*, 1895, 22 R. 812; *International Fibre Syndicate, Ltd. v. Dawson*, 1900, 2 F. 636; 1901, 3 F. (H.L.) 32; *Berlitz School of Languages, Ltd. v. Duchêne*, 1903, 6 F. 181; *Rodger v. Herbertson*, 1909 S.C. 256.

<sup>5</sup> 18 & 19 Vict. c. 111, s. 1.

<sup>6</sup> *The British Waggon Co. and the Parkgate Waggon Co. v. Lea & Co.*, 1880, L.R. 5 Q.B.D. 149; *The West Stockton Iron Co. v. Nielson & Maxwell*, 1880, 7 R. 1055; *Johnston & Reay v. Nicoll & Son*, 1881, 8 R. 437; see also, for illustration of this principle, *Fleming v. Robertson*, 1859, 21 D. 548; 4 Macq. 167; *Tully v. Ingram*, 1891, 19 R. 65; *Blumer & Co. v. Scott & Sons*, 1874, 1 R. 379; *Tinnevelley Sugar Refining Co., Ltd. v. Mirrlees, Watson & Varyan Co.*, 1894, 21 R. 1009; *Stevenson & Sons v. Maule & Son*, 1920 S.C. 335.

<sup>7</sup> *Anderson v. Hamilton & Co.*, 1875, 2 R. 355; *Tolhurst v. Associated Portland Cement Manufacturers* [1903] A.C. 414; *Asphaltic Limestone Concrete Co. v. Glasgow Corporation*, 1907 S.C. 463; *Cole v. Handasyde & Co.*, 1910 S.C. 68.

SECTION 11.—ASSIGNATION OF CLAIMS ARISING *EX DELICTO*.

16. Obligations arising *ex delicto* are not distinguished in respect of assignability from obligations arising *ex contractu*. Accordingly, claims of this kind are transmissible to the same effect as other personal rights.<sup>1</sup>

## SECTION 12.—CONFLICT OF LAWS.

17. It is outwith the scope of this section to deal fully with questions of conflict of laws arising in connection with assignments of moveables and incorporeal rights.<sup>2</sup> Generally speaking, the validity of an assignment of an incorporeal right represented by a document, such as a policy of insurance, depends on the law of the country where the transfer takes place.<sup>3</sup> Thus, although Scots Law does not recognise the constitution of a security over a policy of insurance by a deposit of the policy, a deposit with a domiciled Englishman of a policy issued by a Scottish company, made in England by a Scotsman, will be upheld as a valid assignment of the policy.

18. In the case of corporeal moveables represented by documents of title, the law of the country where the moveables are situated determines the method in which the documents can be assigned.<sup>4</sup>

19. In the case of debts and other obligations, the validity of an assignment will in general be determined by the law of the domicile of the debtor.<sup>5</sup> On the same principle, the law to be applied in relation to a trust fund is the law of the country where the fund is situated, the Courts of which have jurisdiction over the trustees.<sup>6</sup>

## SECTION 13.—ASSIGNATION OF SPECIAL KINDS OF PROPERTY.

20. By the Patents and Designs Act, 1907,<sup>7</sup> assignments of patents and designs are directed to be recorded in the respective Registers of Patents and Designs, and these registers are *prima facie* evidence of the matters inserted in them. Similar provisions with regard to the assignment of trade marks are to be found in the Trade Marks Act, 1905.<sup>8</sup> See PATENTS, DESIGNS, TRADE MARKS.

<sup>1</sup> *Traill & Sons v. Actieselskab Dalbeattie, Ltd.*, 1904, 6 F. 798.

<sup>2</sup> See Foote, *Private International Jurisprudence*, 4th ed. 248; Story, *Conflict of Laws*, ss. 392, 395; Bar, *International Law*, Gillespie's ed., 602-3, and Note T; *Williams v. Colonial Bank*, 1888, L.R. 38 Ch. D. 388; 1890, 15 A.C. 267.

<sup>3</sup> *Scottish Provident Institution v. Cohen & Co.*, 1888, 16 R. 112. See also *Lee v. Abdy*, 1886, 17 Q.B.D. 309; *Scottish Provident Institution v. W. A. Robinson and Ors.* (O.H.), 1892, 29 S.L.R. 733.

<sup>4</sup> *Connal & Co. v. Loder*, 1868, 6 M. 1095; *Inglis v. Robertson & Baxter*, 1898, 25 R. (H.L.) 70.

<sup>5</sup> *Strachan v. M'Dougle*, 1835, 13 S. 954 (which Lord Stormonth Darling in *S.P.J. v. W. A. Robinson and Ors.* (*supra*) considered was overruled by later decisions): *Donaldson v. Ord*, 1855, 17 D. 1053; *Wallace v. Davies & Chambres*, 1853, 15 D. 688; *In re Queensland Mercantile and Agency Co.*, [1892] 1 Ch. 219 (C.A.).

<sup>6</sup> *Montgomery v. Zarifi*, 1918 S.C. (H.L.) 128.

<sup>7</sup> 7 Edw. VII. c. 29, ss. 28, 30, 52, and 71.      <sup>8</sup> 5 Edw. VII. c. 15, ss. 4, 22, 27, 33, and 40.



**21.** The assignation of copyrights is regulated by the Copyright Act, 1911,<sup>1</sup> which provides that the owner of a copyright may, under certain restrictions, assign the right either wholly or partially, but provides that no assignment shall be valid unless in writing. The Register of Copyrights formerly kept at Stationers' Hall was abolished by the Act, and no registration or intimation of an assignment is required. See COPYRIGHT.

**22.** Reference has already been made to the facilities afforded by the Policies of Assurance Act, 1867, with respect to the transfer of policies of assurance (see *ante*). Shares in companies incorporated under the Companies Acts are to be transferred in manner provided by the regulations of the company.<sup>2</sup> The transmission of bills and promissory notes is regulated by the Bills of Exchange Act, 1882.<sup>3</sup> See BILL OF EXCHANGE.

**23.** Shares in ships may be transferred as provided in the Merchant Shipping Acts, 1894 and 1906,<sup>4</sup> which require the registration of assignations. But until a ship has been entered in the registry as such, it is simply a corporeal moveable, transferable by delivery actual or constructive. See SHIP.

**24.** In the assignation of unregistered leases, where these are assignable, intimation to the landlord is not sufficient to complete the right in a question with third parties, although sufficient in a question with the landlord. Possession, natural or civil, is necessary. Thus, when the cedent is in actual possession, the assignee must complete his right by actual possession; when the cedent has sublet, the assignee may complete his right by intimation to the subtenant. Leases of thirty-one years and upwards, recorded in the appropriate Register of Sasines under the Registration of Leases (Scotland) Act, 1857, may be transferred or assigned in security in accordance with the provisions of that Act<sup>5</sup> as amended by the Conveyancing (Scotland) Act, 1924.<sup>6</sup> See LEASE.

**25.** The assignation of heritable securities, and of ground annuals and real burdens, is regulated by the various Scots Conveyancing Statutes.<sup>7</sup> See BURDENS, GROUND ANNUAL, HERITABLE SECURITIES.

<sup>1</sup> 1 & 2 Geo. V. c. 46, s. 5.

<sup>2</sup> Companies (Consolidation) Act, 1908, 8 Edw. VII. c. 69, s. 22.

<sup>3</sup> 45 & 46 Vict. c. 61.

<sup>4</sup> 57 & 58 Vict. c. 60; 6 Edw. VII. c. 48.

<sup>5</sup> 20 & 21 Vict. c. 26.

<sup>6</sup> 14 & 15 Geo. V. c. 27, s. 24.

<sup>7</sup> Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101); Conveyancing (Scotland) Act, 1874 (37 & 38 Vict. c. 94); Conveyancing (Scotland) Act, 1924 (14 & 15 Geo. V. c. 27).



ASSIGNATION OF RENTS.  
ASSIGNATION OF WRITS.

*See* BOND; CHARTER; DISPOSITION.

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ASSOCIATION (VOLUNTARY).

*See* ACTION; BUILDING SOCIETIES; CHURCH; CLUBS;  
FRIENDLY SOCIETIES; TRADE UNION.

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ASSUMPTION OF THIRDS.

*See* TEINDS.

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ASSUMPTION OF TRUSTEES.

*See* TRUSTEE.

## ASSURANCE.

*See* INSURANCE.

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## ASSYTHMENT.

*See* NEGLIGENCE.

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## ASTRICTION.

*See* THIRLAGE.

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## ASYLA.

*See* IMPRISONMENT FOR DEBT.

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## ASYLUM.

*See* INSANITY AND LUNACY.

## ATHEISM.

*See* AFFIRMATION ; CRIME ; OATH.

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## ATTAINDER.

ATTEMPT TO COMMIT CRIME.

ATTEMPT TO MURDER.

*See* CRIME.

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## ATTESTOR.

*See* BILL CHAMBER.

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## ATTORNEY.

*See* AGENCY ; INFESTMENT.

# AUCTION.

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## SECTION 1.—DEFINITION.

26. Auction and Roup are generally regarded as synonymous with public—as opposed to private—sale, the Scottish term roup being confined mainly to sales of heritable subjects and agricultural sales. This does not imply, however, that such sales must be open to the public. “A person who chooses to sell by auction has as clear a right to nominate the conditions on which . . . and the person to whom he chooses to sell, as he who sells in any other way.”<sup>1</sup> Thus, even where an auction was held in a public market established by the Local Authority, it was held competent for auctioneers to exclude altogether from the bidding a particular class of persons.<sup>2</sup> The position would seem to be different in an auction held under a statute which states or indicates that the sale must be open to the King’s subjects.<sup>3</sup>

## SECTION 2.—CONDUCT OF AUCTION.

27. The distinctive feature of sales by auction—that the price is determined, as also the purchaser, by open competition, in lieu of secret tender or private treaty—has given rise to certain implied conditions, more or less well established.

### SUBSECTION (1).—*Withdrawal of Lots and Bids.*

28. Except in the case of sale of goods, it seems probable, though not certain, that, according to Scots law, once the bidding is opened the exposor cannot withdraw the subjects, nor can a bidder retract until

<sup>1</sup> Per Ld. Kincairney in *Scottish Wholesale Co-operative Society v. Glasgow Fleshers’ Trade Defence Association*, 1898, 35 S.L.R. at 649.

<sup>2</sup> *Scottish Wholesale Co-operative Society, supra.*

<sup>3</sup> *Eagleton v. The East India Company*, 1802, 3 Bos. & P. 55.



the subject is knocked down to another.<sup>1</sup> The mere advertising of a sale, however, does not bind the exposor to proceed, and it has been held in England that withdrawal does not entail liability to those attending at the place and time advertised.<sup>2</sup> In the case of sale of goods, the Sale of Goods Act of 1893—following English Law—allows bids to be withdrawn at any time before the fall of the hammer.<sup>3</sup> This enactment has been construed as conferring upon the seller, by implication, the concurrent privilege of withdrawing the subjects even after bids have been made,<sup>4</sup> but this view seems open to question, especially in the case of sales intimated to be without reserve. Such intimation would seem to negative an implied right to withdraw. Moreover, it is far from clear that English common law recognised any such right, for certain *dicta* in one of the leading cases on auction sales indicate that withdrawal under such circumstances would render the seller, and possibly the auctioneer, liable in damages.<sup>5</sup> If such a privilege had been intended it would surely have been expressly conferred by the Statute.<sup>6</sup>

#### SUBSECTION (2).—*Who may bid.*

**29.** General principle requires “entire good faith”<sup>7</sup> to be observed in connection with the bidding so that the price be not unfairly enhanced nor the subjects unfairly sacrificed. In practice, however, this principle is not always observed. “Knock-outs” are apparently legal in England,<sup>8</sup> though not in Scotland,<sup>9</sup> but in neither country has it been held illegal for one person to agree not to bid against another. Less leniency is shown to sellers. “Mock auctions” are illegal in both countries.

**30.** The seller, of course, may not bid himself, “for no man can be buyer and seller at the same time.”<sup>10</sup> The apparent exception allowed by the Sale of Goods Act, where a right to bid is expressly reserved by the seller,<sup>11</sup> is only the English equivalent of the Scots practice of selling subject to an upset price, to guard against the subjects being thrown away. Since the Act came into force it has become fairly common in Scotland to reserve a right to bid or to intimate that there is a reserve price without disclosing the amount; this would seem to be in accordance

<sup>1</sup> *Cree v. Durie*, 1st Dec. 1810, F.C.; *Fenwick v. Macdonald, Fraser & Co.*, 1904, 6 F. 850 at 854.

<sup>2</sup> *Harris v. Nickerson*, 1873, L.R. 8 Q.B. 286.

<sup>3</sup> Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 58 (2).

<sup>4</sup> *Fenwick v. Macdonald, Fraser & Co.*, *supra*.

<sup>5</sup> *Warlow v. Harrison*, 1859, 1 E. & E. 309, per Martin, B. at 316; see also Halsbury's Laws of England, i. 1039.

<sup>6</sup> As to whether a bid is the offer or the acceptance of the exposor's offer, see Brown on Sale of Goods Act, 2nd ed., p. 402.

<sup>7</sup> Per Ld. Ardmillan in *Shiell v. Guthrie's Trs.*, 1874, 1 R. at 1092.

<sup>8</sup> *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635.

<sup>9</sup> *Murray v. M'Whan*, 1783, Mor. 9567.

<sup>10</sup> Per L.P. in *Wright v. Buchanan*, 1917, S.C. 73, at 80.

<sup>11</sup> *Shiell v. Guthrie's Trs.*, and *Wright v. Buchanan*, *supra*.

with the Act—though scarcely fair to the bidders. It is also in accordance with common law in Scotland.<sup>1</sup>

**31.** It is clearly fraudulent for the exposor to arrange secretly for another or others to bid up the price for him.<sup>2</sup> The employment of such persons, known as “puffers” or “whitebonnets,” has always been condemned by our Courts, and generally in England also,<sup>3</sup> though there the decisions have been less consistent owing to a rule in equity that the seller may have one bid.<sup>4</sup> The Sale of Goods Act, however, unreservedly adopts the common law, and for sales of land similar provision is made by an English Statute.<sup>5</sup> In sales of other subjects than land or “goods” it seems possible in England for the exposor to claim the right to at least one bid without any reservation.

**32.** Where any bid is made in contravention of the rules above stated, it is open to the highest *bona fide* bidder either to reduce the sale and claim damages or to demand that he be preferred to the purchase at the last price bid before the first illegal bid.<sup>6</sup>

**33.** A person selling in a fiduciary capacity—as for example a trustee or common agent<sup>1</sup>—is no more entitled to bid than one selling on his own behalf, but for a different reason. He might sell in one capacity and buy in another, but for him to do so might conflict with the duties of his office, and prejudice the interests of the beneficiaries.<sup>7</sup> Thus a bid illegal on this ground can be challenged only by the beneficial owner or owners. A member of the public has no cause of action—not even where the subjects have been knocked down to him at an increased price, always providing the beneficial owner was not privy to the bidding at the instance of the exposor.<sup>2</sup>

**34.** Broadly speaking, the beneficial owner is disqualified from bidding, either himself or by others, just as if he were exposing the subjects on his own behalf. Thus it has been held that the following may not bid: The sole residuary legatee at a sale of trust property,<sup>3</sup> the bankrupt at a sale of his sequestrated estate,<sup>4</sup> the majority of the joint owners of a ship exposed by them for sale under a decree of set and sale,<sup>5</sup> and the owner at a sale of property by a heritable creditor.<sup>6</sup> On the other hand it has been held competent, in the absence of fraud or collusion and failing challenge by the beneficial owner or owners, for one or more of several beneficiaries in the sale of trust property and for one of several heritable creditors in the sale of the security subjects,

<sup>1</sup> *Thom v. Macbeth*, 1875, 3 R. 161.

<sup>2</sup> *Shiell v. Guthrie's Trs.*, and *Wright v. Buchanan*, *supra*.

<sup>3</sup> *Bexwell v. Christie*, 1776, 1 Cowp. 395, per Ld. Mansfield, at 396.

<sup>4</sup> See 19 Geo. III. c. 56, s. 12.

<sup>5</sup> Sale of Land by Auction Act, 1867, ss. 4, 5, and 6.

<sup>6</sup> *Faulds v. Corbett*, 1859, 21 D. 587, and *Wright v. Buchanan*, *supra*.

<sup>7</sup> *York Buildings Co. v. Mackenzie*, 1795, Mor. 13367.

<sup>8</sup> *Faulds v. Corbett*, *supra*.

<sup>9</sup> *Anderson v. Stuart*, 16th Dec. 1814, F.C.

<sup>10</sup> *Morrice v. Craig*, 1902, 39 S.L.R. 609 (O.H.).

<sup>11</sup> *Jamieson v. The Edinburgh Mutual, &c. Society* (O.H.), 1913, 2 S.L.T.

to bid for and be preferred to the subjects.<sup>1</sup> It has also been held in the Sheriff Court that one who exposes goods for sale by auction under a possessory lien is entitled to bid;<sup>2</sup> and in the Outer House that bidding by a commissioner at the sale of the bankrupt's property did not entitle the purchaser to partial reduction.<sup>3</sup>

SUBSECTION (3).—*Agreements and Inducements not to bid.*

35. A recent decision in England makes it doubtful how far bidders may be prevented from using unfair means to stifle competition at a sale by auction. This question has not been before the Scots Courts for over a century, but in one case it was held unlawful to bribe others not to bid.<sup>4</sup> In another, the only persons commissioned to bid agreed that one should buy at the upset price, the property to go eventually to him who had been authorised to make the highest offer, the difference between this and the upset price to be divided. The sale was reduced, and the original purchaser found liable in the expense of re-exposure.<sup>5</sup> The English case referred to lays it down that there is nothing illegal in an agreement not to compete even though the parties also agree to share the profit on resale.<sup>6</sup> It is actionable, however, to make untrue statements to prevent bidding.<sup>7</sup>

SECTION 3.—COMPLETION OF CONTRACT AND CONDITIONS OF SALE.

36. In sale of goods the contract, being consensual, is complete and enforceable in Scotland as soon as "the auctioneer announces its completion by the fall of the hammer or in other customary manner."<sup>8</sup> The same rule applies to sales of all other subjects except heritable property. In that case without a properly executed Minute of Enactment or some equivalent writing, and in the absence of *rei interventus*,<sup>9</sup> neither party can compel the other to implement the contract.<sup>10</sup> This rule was applied even where the seller admitted on record that the pursuer had offered the upset price at a roup,<sup>11</sup> and also because one witness had failed to sign the Minute of Enactment.<sup>12</sup> In England, the auctioneer has implied authority to sign as agent for the purchaser the memorandum required to elide the provisions of the Statute of Frauds and s. 4 of the Sale of Goods Act.<sup>13</sup> Such authority is held to be conferred by the bidding.<sup>13</sup> The same principle might conceivably be applied to sales of heritable property in Scotland.

<sup>1</sup> *Shiell v. Guthrie's Trs. and Wright v. Buchanan*, *supra*.

<sup>2</sup> *Hendry v. Newton, Bennie & Co.*, 1874, 1 Guth. Sel. Cas. 529.

<sup>3</sup> *Wishart v. Howatson*, 1897 (O.H.), 5 S.L.T. 84.

<sup>4</sup> *Aitchison*, 1783, Mor. 9567.

<sup>5</sup> *Murray v. M'Whan*, 1783, Mor. 9567.

<sup>6</sup> *Rawlings v. General Trading Co.*, [1921] 1 K.B. 635.

<sup>7</sup> *Fuller v. Abrahams*, 1821, 6 Moore, C.P. 316, 3 Br. & B. 116.

<sup>8</sup> Sale of Goods Act, 1893, s. 58.

<sup>9</sup> *Stewart v. Burns*, 1877, 4 R. 427.

<sup>10</sup> *Aberdeen v. Stratton's Trs.*, 1867, 5 M. 726; and *Shiell v. Guthrie's Trs.*, *supra*.

<sup>11</sup> *Jamieson v. The Edinburgh Mutual, &c. Society*, *supra*.

<sup>12</sup> *Moncrieff v. Lawrie*, 1896, 23 R. 577.

<sup>13</sup> *Emmerson v. Heelis*, 1809, 2 Taunt. 38, 11 R.R. 510.



**37.** Both at common law and by Statute where subjects belonging to the same owner are put up in lots, each lot is *prima facie* deemed to be the subject of a separate contract. Thus the purchaser of two or more lots may be entitled to reject one or more and keep the remainder.<sup>1</sup> The presumption is only one of fact, however. Thus the purchaser may be entitled to reject the whole, because of a defect in one lot, if it is reasonably clear that the purchases were interdependent.<sup>2</sup> When complete the contract embodies any conditions stipulated for by the exposor—even including notice of a right of pre-emption held by a third party,<sup>3</sup> provided always the conditions have been reasonably disclosed prior to the sale.<sup>4</sup>

**38.** It is not necessary in Scotland to read aloud the conditions of sale if they be printed and hung up in a conspicuous place, or otherwise made accessible to intending bidders.<sup>4</sup> Except in rouns of heritable property, conditions may be validly intimated by oral announcement after the company is assembled. Even where Articles of Roup are used for sales of moveables, *e.g.* at ship auctions, parole evidence is competent of a condition added verbally by the auctioneer.<sup>5</sup> Where, by the conditions, the bidders are to be held as having satisfied themselves as to condition, quality and description, the exposers are not bound to disclose known defects.<sup>6</sup> But where part of the subjects sold did not in fact belong to the exposor, it was held that the purchaser was entitled to resale, notwithstanding similar conditions in the Articles of Roup.<sup>7</sup>

#### SECTION 4.—ARTICLES OF ROUP.

##### SUBSECTION (1).—*General.*

**39.** Articles of Roup formulate *scripto* the conditions upon which heritable property is exposed for sale by auction. Though not essential in auction sales of moveables they are frequently used in the case of ships and machinery. In England all sales of corporeal moveables above £10 in value, require writing or one of its equivalents to be enforceable.<sup>8</sup>

In a sale under Articles of Roup the highest bidder is preferred to the purchase by the execution of a Minute of Preference and Enactment. The Articles and Minute then constitute a contract which must be

<sup>1</sup> Sale of Goods Act, 1893, s. 58, and *Couston Thomson v. Chapman*, 1872, 10 M. (H.L.) 74.

<sup>2</sup> *Holliday v. Lockwood*, [1917] 2 Ch. 47; cf. *Claddagh S.S. Co. v. Steven & Co.*, 1919 S.C. (H.L.) 132.

<sup>3</sup> *Pickett v. Lindsay's Trs.*, 1905 (O.H.), 13 S.L.T. 440.

<sup>4</sup> *Macdonald & Fraser v. Henderson*, 1882, 10 R. 95, and *White v. Dougherty*, 1891, 18 R. 972.

<sup>5</sup> *Christie v. Hunter*, 1880, 7 R. 729.

<sup>6</sup> *Yeats and Ors. (Phillip's Trs.) v. Reid*, 1884, 21 S.L.R. 698.

<sup>7</sup> *Hamilton v. Western Bank*, 1861, 23 D. 1033; but cf. *Young v. Grierson*, 1849, 11 D. 1482.

<sup>8</sup> Statute of Frauds, 1677, 29 C. 2, c. 3, s. 4; Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 4.



stamped.<sup>1</sup> When the subject of sale is heritable, the Articles and the relative Minute of Enactment must be subscribed both by the exposor and by the preferred bidder and must be probative.<sup>2</sup> Even an admission on record that the pursuer had offered the upset price was held not to be sufficient proof of a contract for the sale of heritage.<sup>3</sup> A bidder at a sale of heritage, who disputes the legality of the sale to the bidder ultimately preferred to the purchase, must found upon a probative writing as the evidence of his own prior bid.<sup>4</sup>

40. Articles of Roup in a sale of heritage, even under the powers contained in a Bond and Disposition in Security, may be signed either by the exposers themselves or by their authorised agent. Similarly, the preferred bidder may sign the Minute himself or by his authorised agent.<sup>5</sup> The agent's authority need not be in writing.<sup>6</sup>

#### SUBSECTION (2).—*Caution by Purchaser.*

41. In Articles of Roup of heritage it is a common condition that the purchaser shall be bound, within a specified time, to grant bond with sufficient caution for the price or deposit a percentage thereof. It used also to be commonly stipulated that on failure by the highest bidder to lodge caution, the purchase should devolve upon the next offerer, and where by oversight the highest bidder allowed the period for offering caution to elapse and intimation of devolution was made to the next offerer, the latter was preferred to the purchase.<sup>7</sup> But where intimation of devolution was not made and the next day a proper bond of caution was lodged the highest bidder was preferred.<sup>8</sup> These cases, however, have little application in modern practice, for to-day Articles of Roup provide that the defaulting purchaser shall only forfeit the purchase in the option of the exposor.

#### SUBSECTION (3).—*Conditions as to Title and Extent.*

42. A common condition in Articles of Roup of heritage is that the purchaser shall be held to have satisfied himself as to the title, extent, and measurement. Such a condition was held binding where a purchaser alleged that a small part of the subjects had been found to belong to himself.<sup>9</sup> This condition also covers defects in the exposor's title capable of rectification even at the purchaser's expense.<sup>10</sup> A condition, however, that the purchaser shall accept the title as it stands and subject to all exceptions of any nature, will not bind a purchaser to accept an un-

<sup>1</sup> Sixpence, or 10s. if a registration clause is included.

<sup>2</sup> *Aberdeen v. Stratton's Trs.*, 1867, 5 M. 726; *Shiell v. Guthrie's Trs.*, 1874, 1 R. 1083; *Moncrieff v. Lawrie*, 1896, 23 R. 577.

<sup>3</sup> *Jamieson v. The Edinburgh Mutual &c. Society*, 1913 (O.H.), 2 S.L.T. 52.

<sup>4</sup> *Shiell v. Guthrie's Trs.*, *supra*.

<sup>5</sup> *Roscoe v. Mackersy*, 1905, 7 F. 761.

<sup>6</sup> *Whyte v. Lee*, 1879, 6 R. 699.

<sup>7</sup> *Hannay v. Stothart*, 1788, Mor. 14194.

<sup>8</sup> *Walker v. Gavin*, 1787, Mor. 14193.

<sup>9</sup> *Morton v. Smith*, 1877, 5 R. 83.

<sup>10</sup> *Carruthers v. Stott*, 1825, 4 S. 34; *Sorley's Trs. v. Grahame*, 1832, 10 S. 319.

marketable title,<sup>1</sup> nor will it bar an action of reduction on the ground of essential error.<sup>2</sup> The purchaser is, however, bound by the well-known condition in Articles of Roup of heritage that the exposers bind themselves to grant a valid disposition only under the burdens specified or referred to in the title-deeds.<sup>3</sup>

SUBSECTION (4).—*Disposition in Implement.*

43. As a general rule a disposition in implement of sale accepted by the purchaser supersedes all previous missives and contracts, however formal, including the Articles of Roup.<sup>4</sup> There are, however, certain cases difficult to reconcile with this rule.<sup>5</sup> Where it was a condition that the purchasers “shall be held to have satisfied themselves before the roup as to the sufficiency of the exposers’ title and as to the extent of their respective lots of ground and as to all other particulars affecting or regarding the same,” the purchaser was held barred from claiming damages for non-disclosure of a restrictive condition on the lands purchased although not incorporated in the Disposition.<sup>5</sup> In a later case it was held that a Contract of Sale embodied in the Articles of Roup and Minute of Enactment was not superseded by the Disposition, and as the pursuer, before becoming a purchaser, could have satisfied himself as to the extent of the subjects (which under the Articles he was bound to do), he was barred from objecting and claiming damages.<sup>5</sup> These cases are, no doubt, binding for the particular facts decided by them, but in view of the general rule it is not to be presumed that the doctrines set out in them will be extended.

44. In so far as the subjects sold are moveable, however, Articles of Roup and Missives are not superseded by the Disposition. Accordingly acceptance of a Disposition of a house by the purchaser was held not to preclude his right to delivery of the moveable fixtures and fittings sold therewith.<sup>6</sup>

45. If the purchaser fails to implement his bargain he forfeits the purchase. He is also liable in damages, measured by the difference between the purchase price and the price obtained on re-sale, plus the expense of re-exposure, and that even although the Articles contain a general penalty clause.<sup>7</sup>

SUBSECTION (5).—*Sale by Bondholder.*

46. In a sale under the powers contained in a heritable Bond, the bank into which consignation of the surplus is to be made, must be

<sup>1</sup> *Carter v. Lornie*, 1890, 18 R. 353.

<sup>2</sup> *Hamilton v. Western Bank*, 1861, 23 D. 1033.

<sup>3</sup> *Davidson v. Dalziel*, 1881, 8 R. 990; *Young v. Grierson*, 1849, 11 D. 1482.

<sup>4</sup> *Lee v. Alexander*, 1883, 10 R. (H.L.) 91; *Orr v. Mitchell*, 1893, 20 R. (H.L.) 27; *Batter v. Foster*, 1912 S.C. 1218.

<sup>5</sup> *Wood v. The Magistrates of Edinburgh*, 1886, 13 R. 1006, and *Young v. M’Kellar, Ltd.*, 1909 S.C. 1340.

<sup>6</sup> *Jamieson v. Welsh*, 1900, 3 F. 176.

<sup>7</sup> *Dingwall v. Burnett*, 1912 S.C. 1097.

specified in the Articles of Roup.<sup>1</sup> But where there was no surplus an omission to specify the bank was held not to nullify the sale.<sup>2</sup>

47. In Articles of Roup of heritage sold under a Bond and Disposition in Security, it is competent to give the owner power to bid,<sup>3</sup> and in Articles of Roup of *pro indiviso* property sold under order of Court power to bid may be reserved to the *pro indiviso* proprietors.<sup>4</sup>

#### SECTION 5.—AUCTIONEER.

##### SUBSECTION (1).—*Statutory Requisites.*

48. All auctions or roups must be conducted by a duly licensed auctioneer, and the same condition would seem to apply to sales by sealed tender, at least where the seller is bound to accept the highest offer.<sup>5</sup> The auctioneer is “judge of the roup” and has exclusive jurisdiction to decide questions arising during the course of the sale but not disputes emerging subsequently.<sup>6</sup>

49. The duty upon an auctioneer’s licence is £10,<sup>7</sup> and the penalty for acting without licence is £100.<sup>8</sup> Certain persons, however, are exempted from duty, viz.: persons selling under the Small Debts Act in Scotland,<sup>9</sup> or selling fish where first landed upon the seashore.<sup>10</sup> Revenue and certain other officials are also exempted from licence duty when selling, in virtue of their office. A licensed auctioneer may act as an appraiser or house-agent without taking out an additional licence in either of these capacities.<sup>11</sup> In addition to holding a licence, an auctioneer is required, under a penalty of £20, to exhibit his full Christian name, surname, and residence in large letters on a ticket or board affixed or suspended in a conspicuous part of the room or place where the auction is held.<sup>12</sup> In Scotland, an auctioneer is required, under a penalty of £50, to give at least three days’ written notice to the collector of taxes of the district, of the date upon which it is proposed to begin an auction sale, and of the name, surname, and residence of the person whose goods are to be sold.<sup>13</sup>

##### SUBSECTION (2).—*Rights and Liabilities.*

50. While there is nothing to prevent an auctioneer from selling his own property at the auction,<sup>14</sup> almost invariably he sells for others, and his rights and liabilities fall to be determined by the ordinary law

<sup>1</sup> The Titles to Land Consolidation (Scotland) Act, 1868, 32 & 33 Vict. c. 116, s. 122.

<sup>2</sup> *Roscoe v. Mackersy*, 1905, 7 F. 761.

<sup>3</sup> *Jamieson v. The Edinburgh Mutual &c. Society*, 1913 (O.H.), 2 S.L.T. 52.

<sup>4</sup> *Thom and Ors. v. Macbeth and Ors.*, 1875, 3 R. 161.

<sup>5</sup> 8 & 9 Vict., c. 15, s. 4; *Walker v. Advocate General*, 1813, 1 Dow, 111.

<sup>6</sup> *Strachan v. Auld*, 1884, 11 R. 756.

<sup>7</sup> *Ibid.*, s. 4.

<sup>8</sup> *Ibid.*, s. 5.

<sup>9</sup> 8 & 9 Vict. c. 15, s. 2.

<sup>10</sup> 33 & 34 Vict. c. 32, s. 5.

<sup>11</sup> 46 Geo. III. c. 93, s. 7; 24 & 25 Vict. c. 21, s. 13.

<sup>12</sup> 8 & 9 Vict. c. 15, s. 7.

<sup>13</sup> 43 & 44 Vict. c. 19, s. 97 (9), (10).

<sup>14</sup> *Flint v. Woodin*, 1852, 9 Hare, 618.

of Agency. The presumption is that the auctioneer is merely an agent, and as a general rule "there is no contract with the auctioneer; he is only agent between the buyer and seller."<sup>1</sup> The foregoing *dictum* was approved in a Scots case where the name of the principal was disclosed,<sup>2</sup> following an English decision.<sup>3</sup> It seems, however, to be regarded as settled law in England that when the principal's name is not disclosed, the auctioneer acting as such will be personally bound for fulfilment,<sup>4</sup> which is contrary to the usual rule in Agency.<sup>5</sup> The point has never been squarely decided in Scotland.

51. Like any other agent, an auctioneer is liable to third parties for breach of warranty of authority, and it has been held in England that the principal is not bound where the auctioneer acts without his actual authority although within the usual authority of an auctioneer, in this case selling without reserve.<sup>6</sup> Nor has an auctioneer ostensible authority to give a warranty.<sup>7</sup>

52. To his principal an auctioneer will be liable for any breach of duty or of instructions causing loss. He may also be liable to a purchaser for non-delivery of goods in his possession.<sup>8</sup> He is also bound to exercise reasonable care in the custody of property sent to him for sale, but will not be liable for accidental loss or damage, say by fire or theft.<sup>9</sup> He has a general lien over goods while unsold, and may retain the proceeds for a general balance,<sup>10</sup> but not for cash advances.<sup>11</sup> It has also been held in England that he may sue for the price, and it will be no defence that the purchaser had privately arranged with the principal before the sale, to set off against the price a debt due to the principal.<sup>12</sup>

53. In sale of moveables the auctioneer has authority to receive payment in cash or by cheque if customary,<sup>13</sup> though payment by Bill or I O U will not apparently discharge the purchaser.<sup>14</sup> In sale of heritage or real estate the auctioneer has no such authority, except as regards the deposit, if such is required as a condition of a bid being accepted.<sup>14</sup>

<sup>1</sup> Per Ld. Mansfield in *Bezwilch v. Christie*, 1776, Cowp. 395; see also *Ferrier v. Dods*, 1865, 3 M. 561; and *Walker v. Linton*, 1892, 20 R. (J.C.) 1.

<sup>2</sup> *Fenwick v. Macdonald, Fraser & Co.*, 1904, 6 F. 850.

<sup>3</sup> *Mainprice v. Wortley*, 1865, 6 B. & S. 420.

<sup>4</sup> *Franklyn v. Lamond*, 1847, 4 C.B. 637.

<sup>5</sup> *Calder v. Dobell*, 1871, L.R. 6 C.P. 486.

<sup>6</sup> *M'Manus v. Fortescue*, [1907] 2 K.B. 1; see also *Anderson v. Croall*, 1904, 6 F. 153.

<sup>7</sup> *Crayne v. Leconfield*, 1882, 51 L.J. (Q.B.) 642.

<sup>8</sup> *Woolfe v. Horne*, 1877, L.R. 2 Q.B.D. 355.

<sup>9</sup> *Maltby v. Christie*, 1795, 1 Esp. 340.

<sup>10</sup> *Webb v. Smith*, 1885, L.R. 30 Ch. D. 192; *Miller v. Hutcheson*, 1881, 8 R. 489.

<sup>11</sup> *Craig's Tr. v. Macdonald, Fraser & Co.*, 1902, 4 F. 1132.

<sup>12</sup> *Manley v. Birkett*, [1912] 2 K.B. 329; see also *Hindle v. Brown*, 1908, 98 L.T. 791.

<sup>13</sup> *Farrar v. Lacey*, 1886, 31 Ch. D. 42.

<sup>14</sup> *Sykes v. Giles*, 1839, 5 M. & W. 645; *Williams v. Evans*, 1866, L.R. 1 Q.B. 352, and *Williams v. Millington*, 1788, 1 H. Bl. at 84.



## AUCTOR IN REM SUAM.

*See* AGENCY; JUDICIAL FACTOR; TRUSTEE;  
TUTORS AND CURATORS.

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## AUDITOR OF THE COURT OF SESSION.

*See* COURT OF SESSION.

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## AUGMENTATION.

*See* TEINDS.

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## AUTHENTICATION OF DEEDS.

*See* DEEDS.

## AUTHOR.

*See* COPYRIGHT ; DISPOSITION ; SINGULAR SUCCESSOR.

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## AUXILIARY FORCES.

*See* ARMED FORCES OF THE CROWN.

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## AVAIL OF MARRIAGE.

*See* CASUALTIES OF SUPERIORITY.

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## AVAL.

*See* BILL OF EXCHANGE.

# AVERAGE.

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## SECTION 1.—INTRODUCTION.

**54.** In the following sections it is proposed to deal with General Average as opposed to Particular Average, which means damage incurred by one part of a marine adventure which that part must bear alone, so that in effect it is not average at all.<sup>1</sup> There has been controversy on the question whether or not the right to contribution given by the law of General Average arises from an implied contract. The weight of authority favours the view expressed by Lord Esher that it does not so arise, but comes from the old Rhodian laws, and has become incorporated with our law as part of the law of the ocean. He says: "It is not as a matter of contract but in consequence of a common danger where natural justice requires that all should contribute to indemnify the loss of property which is sacrificed by one in order that the whole adventure may be saved."<sup>2</sup> It has been added by more than one of those who have discussed the point, that it is of little practical moment at this date which view is taken.

## SECTION 2.—MARINE INSURANCE ACT, 1906.

**55.** The law affecting General Average has not been generally codified. By the Marine Insurance Act, 1906,<sup>3</sup> section 66, the following provisions are made :—

(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.<sup>4</sup>

GENERAL AUTHORITIES.—Lowndes on General Average ; Carver on Carriage by Sea ; Arnould on Marine Insurance.

<sup>1</sup> *The "Copenhagen,"* 1799, 1 Rob. A. 289.

<sup>2</sup> *Burton v. English*, 1883, 12 Q.B.D. 218 ; cf. *Strang, Steel & Co. v. A. Scott & Co.*, 1889, 14 App. Ca. 601.

<sup>3</sup> 6 Edw. VII. c. 41.

<sup>4</sup> See *Birkley v. Presgrave*, 1801, 1 East, 220, per Mr. Justice Lawrence.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.

(4) Subject to any express provision in the policy, where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him; and, in the case of general average sacrifice, he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute.

(5) Subject to any express provision in the policy, where the assured has paid, or is liable to pay, a general average contribution in respect of the subject insured, he may recover therefor from the insurer.

(6) In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connexion with the avoidance of a peril insured against.

(7) Where ship, freight, and cargo, or any two of those interests, are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is to be determined as if those subjects were owned by different persons.<sup>1</sup>

The rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of the Act, continue to apply to the law of General Average. By the interpretation clause of the Act freight includes the profits derivable from a shipowner from the employment of his ship to carry his own goods or moveables, as well as freight payable by a third party, but does not include passage money.

### SECTION 3.—THE YORK-ANTWERP RULES.

**56.** Efforts have been made to internationalise the law of average by rules made first in 1877. The York-Antwerp Rules, 1890, were formally approved by a Conference of the Association for the Reform and Codification of the Law of Nations, and to a large extent have been made part of the contracts between shipowners and charterers and shippers. In 1924 a revised set of rules was adopted by the Conference, which are called the York-Antwerp Rules, 1924.<sup>2</sup> The rules do not alter the law merchant, except where they have been so adopted as to form the basis of an agreement between the shipowner and the shippers. In general, underwriters provide that effect is to be given to the rules—hitherto the York-Antwerp Rules, 1890—if in accordance with the contract of affreightment, but in that case only. The position is vividly

<sup>1</sup> See *The "Brigella,"* [1893] P. 189; *Montgomery & Co. v. Indemnity Mutual Marine Insurance Co.*, [1902] 1 K.B. 734.

<sup>2</sup> The Rules will be found appended to this title.



illustrated by the case of *Chellow v. Royal Commission on the Sugar Supply*.<sup>1</sup> In that case the shipowners had incurred a general average expenditure, and subsequently the ship and cargo were totally lost. It was held that the shipowner could not recover any contribution in general average from the owners of the cargo. There was a reference to arbitration to Mr. F. D. MacKinnon, K.C. (now Mr. Justice MacKinnon). He held that, according to the common law of England on the subject of general average, in the circumstances the shipowner could not recover from the owner of the cargo, but he held separately that, construing the York-Antwerp Rules, 1890, the claim was excluded by these rules by which the shipowner and shippers had agreed to be bound. The award was stated in the form of a Special Case, and came before Mr. Justice Sankey, who agreed *in toto* with Mr. Justice MacKinnon; but the case went to the Court of Appeal, and the Lord Justices, while they adhered to the judgment, did so only on the ground that the York-Antwerp Rules, 1890, did not warrant the claim, and applied to the case, Lord Justice Scrutton stating that he reserved to himself full liberty to consider the question of common law in the absence of agreement when it arose.<sup>2</sup>

#### SECTION 4.—NATURE OF SACRIFICE AND EXPENDITURE REQUIRED.

##### SUBSECTION (1).—*Control of Master.*

**57.** The marine adventure during which there is the possibility of a general average loss and claim is necessarily in the ordinary case controlled by the master of the ship, and he is the person who, in the event of the question arising of making a sacrifice or expenditure to which the several interests are liable to contribute, has power to act. There are certain American cases where it has been held that the master alone has the right. These cases have been the subject of adverse comment in the States and elsewhere. It is thought that, according to the law merchant of this country, in special circumstances the obligation to contribute is not dependent upon the master necessarily having been the person to order the sacrifice or make the expenditure.<sup>3</sup> No doubt in the ordinary case he is the proper person, but if the circumstances show that a sacrifice or the expenditure was necessary for the common benefit, and if a reasonable explanation is given of why someone else than the master acted, it is thought the claim will be sustained according to our law and where that law applies. If the sacrifice or expenditure has been proper in the interests of the whole joint adventure, it does not seem equitable to reject the claim because of the technicality that the master has not ordered it, if it has been ordered for the common benefit. At the same time, if a complete stranger to the adventure acts without

<sup>1</sup> [1921] 2 K.B. 627; [1922] 2 K.B. 12 (C.A.).

<sup>2</sup> *Chellow, ut supra*, C.A. p. 20.

<sup>3</sup> See *Papayanni v. Grampian S.S. Co., Ltd.*, 1896, 1 Com. Cas. 448; also Carver on Carriage, 7th ed., ss. 374, 374A.

reasonable excuse, the absence of authority on his part would probably be fatal to the claim.

SUBSECTION (2).—*Discretion of Master.*

58. As the master has to act in an emergency and often hurriedly, and as it is important he should be encouraged to do so for the safety of the venture, the Courts keep this in view. In one case, where the ship was leaking, damage needlessly done was held to found a good case for general average, though it turned out that the leak was not below the water-line. The master must act prudently in light of the circumstances as he reasonably thinks they are. If there is no danger at all, no case for general average will be held to exist.<sup>1</sup>

SUBSECTION (3).—*Sacrifice must be extraordinary.*

59. The sacrifice, including in this word for the moment expenditure, must be extraordinary. It is not enough that the claimant has suffered more than in ordinary circumstances. If a ship has carried a press of sail to avoid going on a lee shore or to escape an enemy, and has had her sails injured; or has been damaged in defending herself and cargo against attack; or a sailing ship having an auxiliary engine and having been dismasted has consumed a large quantity of coal in steaming to her port of destination, a claim to contribution must be rejected because the shipowner in each case is only doing that which, under his contract of affreightment, he is bound to do, although he is exposed to loss to a greater extent than he had contemplated.<sup>2</sup>

60. How narrow the line may be is illustrated by the fact that a claim for general average is allowed when a steamer through perils of the sea, and in an emergency, has to use part of her spars or other materials for fuel for her engines, coal having run out without fault;<sup>3</sup> also in respect of damage to the engines of a steamer and use of coal where the engines were worked in order to force the vessel off a place where she had stranded; because engines are intended to move vessels through the water and not to force them off the ground.<sup>4</sup> The principle to be applied is clear, but it has been illustrated in the case of claims by ships, as its application is more difficult in such cases, from the fact that the ship is under obligation to make both expenditure and sacrifice in order to do her part under the contract of affreightment, and it is only where the sacrifice or expenditure is abnormal and extraordinary in the sense now explained that she can claim relief.

<sup>1</sup> *Joseph Watson & Son, Ltd. v. Firemen's Fund Insurance of San Francisco*, [1922] 2 K.B. 355.

<sup>2</sup> *Power v. Whitmore*, 1815, 4 M. & S. 141; *Covington v. Roberts*, 1806, 2 B. & P. (N.R.) 378; *Soci  t   Nouvelle D'Armement v. Spillers & Bakers*, [1917] 1 K.B. 865; *Robertson v. Brown*, 1785, Mor. 13430; *Wilson v. Bank of Victoria*, 1867, L.R. 2 Q.B. 203.

<sup>3</sup> *Robinson v. Price and Ors.*, 1877, 2 Q.B.D. 295.

<sup>4</sup> *The "Bona,"* [1895] P. 125.

61. Further illustrations of good claims to contribution may be given. A vessel was loaded with coal, part of which took fire by spontaneous combustion, without fault on the part of the cargo owner. Damage was done to the coal as a whole by the steps taken to extinguish the fire and prevent it extending. The case was held one for general average contribution to the cargo owner.<sup>1</sup> So in getting goods out of a ship or getting at them or at a source of danger, damage may have to be done to the ship or to other goods. This also founds a claim to contribution.<sup>2</sup> In a case where a ship had to take refuge in a port in Brazil, having cattle on board bound for the United Kingdom, and by British law, the result was the cattle could not be brought to Britain, the cargo owners were held to have a good claim to contribution because of the cattle being depreciated in value.<sup>3</sup> On the other hand, no claim is allowed in respect of delay caused to ship or cargo,<sup>4</sup> or, according to our law, differing from that of various other countries, as also from the York-Antwerp Rules, for wages of crew and provisions while the ship is in the port of refuge. Saving of lives does not ground a claim.

SUBSECTION (4).—*Sacrifice must be real.*

62. The sacrifice must not only be extraordinary, but it must be real. Where, whether the act relied upon as the act of sacrifice had been done or not, the thing in respect of which contribution is claimed would, by reason of its own state or condition, have been of no value whatever, or would have been certainly or absolutely lost to the owner, although the rest of the adventure had been saved, there is nothing lost to the owner by the act, and therefore there is nothing sacrificed.<sup>5</sup> Thus, the cutting away of a mast which has already practically gone does not entitle the ship to claim in general average, though good may result to the marine adventure from the mast being at once cut off. But though the sacrifice of the part must be real, this does not mean that if, *e.g.* a ship would be lost as a whole did she not sacrifice a part, she will therefore not be entitled to claim contribution from cargo which is also saved by the sacrifice of that part. To ground a claim the adventure must be in imminent peril, and the claim is strongest when the danger is most imminent, and the sacrifice alone can lessen or avoid it.

SUBSECTION (5).—*Sacrifice must be intentional.*

63. It is an essential element of a general average claim that the sacrifice or expenditure has been intentionally made by or on behalf of the marine adventure by someone acting as the agent for the different

<sup>1</sup> *Greenshields, Cowie & Co. v. Stephens & Sons*, [1908] A.C. 431.

<sup>2</sup> *Whitecross Wire Co. v. Savill*, 1882, 8 Q.B.D. 653.

<sup>3</sup> *Anglo-Argentine, &c. Agency v. Temperley Shipping Co.*, [1899] 2 Q.B. 403.

<sup>4</sup> *The "Leitrim"*, [1902] P. 256.

<sup>5</sup> *Shepherd v. Kottgen*, 1877, 2 C.P.D. 585, per Lord Esher.



interests in order to avoid or lessen a loss. One of the most difficult and controversial cases under this head is where general average is claimed in respect of an alleged voluntary stranding of the ship for the common safety. If the stranding is truly voluntary, and with that object, the claim, it is submitted, is good ;<sup>1</sup> but when stranding somewhere is inevitable, the mere fact that the exact place is to some extent selected is not in the ordinary case enough unless it can be shown that the place selected meant a real sacrifice of the ship for the whole venture.

#### SECTION 5.—EXTENT OF CLAIM.

##### SUBSECTION (1).—*General Principle.*

64. If the sacrifice is reasonable and prudent and the course taken the best, then the claim to contribution will cover all that was reasonably done to save the venture. The “Winchester” was bound for Sharpness Docks with a cargo of maize. She grounded on her way up, and ship and cargo were in serious danger. The pilot and master decided to take her into dock, though in the state of the tide both contemplated her striking the lower pier and doing damage. It was held that when occasion arises for a general average act the master has implied authority to do whatever is necessary and prudent for the preservation of the venture, even if this involves committing a trespass, and that cargo fell to contribute to make good the damage.<sup>2</sup> In such a case the compensation falling to be paid has to be treated as if it were extraordinary expenditure for the common benefit.

##### SUBSECTION (2).—*Exclusion of Claim by Fault.*

65. If the peril from which the adventure is rescued is due to the fault of those whose property is sacrificed there is in general no claim to contribution. If goods are sacrificed which are a source of danger from inherent vice, having been shipped through fault in improper condition, or if the peril to the ship is due to unseaworthiness or faulty navigation of the master which has brought the whole venture into peril, no claim can be made.<sup>3</sup> So, if coal runs short owing to want of a reasonable supply for the voyage. The rule is subject to the qualification that where other interests have agreed to run the risk which has brought about the peril, a claim can be made, *e.g.* where by the shipping contract the owners are freed from liability for the negligence of the master and the sacrifice has been necessary because of a peril due to negligence on his part.<sup>4</sup> Goods jettisoned because of a peril brought about by faulty navigation

<sup>1</sup> *Landale v. Thomson*, 1763, Mor. 13428 ; Bell's Com., 7th ed., i. 635.

<sup>2</sup> *Austin Friars S.S. Co. v. Spillers & Bakers*, [1915] 1 K.B. 833, 3 K.B. 586.

<sup>3</sup> See *Klein and Ors. v. Lindsay and Ors.*, 1910 S.C. 231, rev. [1911] A.C. 194.

<sup>4</sup> *Klein v. Lindsay*, *supra*; “*Carron Park*,” 1890, 15 P.D. 203; *Milburn & Co. v. Jamaica Fruit Importing and Trading Company of London*, [1900] 2 Q.B. 540; *Strang, Steel & Co. v. Scott & Co.*, 1889, 14 App. Ca. 601.



can claim contribution from the owners of other goods notwithstanding that the ship may be liable in relief. Although the shipping contract bargains that goods are carried at merchants' risk, this does not prevent their owners claiming contribution if they are sacrificed.<sup>1</sup> Deck cargo jettisoned cannot claim contribution unless by custom in the particular trade deck cargoes are carried, as in the coasting trade.<sup>2</sup> But where the shipper is owner of the whole cargo, it has been held that the ship-owners must contribute for cargo carried on deck under the charter, which cargo has been jettisoned ;<sup>3</sup> and the same rule is said to apply where all the shippers have agreed to a deck cargo being carried.<sup>4</sup>

### SUBSECTION (3).—*Character of Extraordinary Expenditure.*

**66.** Extraordinary expenditure within the statutory definition is incurred to defray services of various kinds rendered to rescue the marine adventure from peril or lessen loss to those concerned, and difficult questions may arise how far the expenditure is to be treated as a general average act for behoof of the whole adventure to lessen peril, and when it becomes a special charge against one or more interests. The answer generally turns on how far and how long the operations can be said to be part of one continuous act for the benefit of the whole venture. When the operations are for the safety of special parts rather than part of work to relieve the whole from danger, they must be treated as special charges.<sup>5</sup> This question becomes of special importance in cases where work is undertaken to salve the ship and cargo from danger, and in a sense it is a question of fact at what point the charges become special charges and not part of a continuous operation as before mentioned. Specie, *e.g.* if it has been landed and put in safety does not contribute to further operations for the rest of the marine adventure.<sup>6</sup>

**67.** In certain cases expedients are resorted to with the object of saving expense which, under the head of substituted expenses, are allowed in practice in general average so far as, if they had not been incurred, there would have been other expense of equal or greater amount which would have been incurred and chargeable as general average. Such expenditure is frequently incurred when ships are obliged to put into a port of refuge with a view to common safety. The question of what expenses are in these cases the subject of general average and what fall to be charged against particular interests has been the subject of serious litigation, and it cannot be said that the law is yet clear.<sup>7</sup> Indeed, in the case of *Svensden*, it was laid down that, as

<sup>1</sup> *Burton v. English*, 1883, 12 Q.B.D. 218.

<sup>2</sup> *Wright v. Marwood*, 1881, 7 Q.B.D. 62.

<sup>3</sup> *Johnson v. Chapman*, 1865, 35 L.J. C.P. 23 ; 19 C.B. N.S. 563.

<sup>4</sup> *Strang, Steel & Co.*, *supra*.

<sup>5</sup> *Walthev v. Mavrojani*, 1870, L.R. 5 Ex. 116.

<sup>6</sup> *Royal Mail S.P. Co. v. English Bank of Rio Janeiro*, 1887, 19 Q.B.D. 362.

<sup>7</sup> *Atwood v. Sellar*, 1880, 5 Q.B.D. 286 ; *Svensden v. Wallace*, 1884, 13 Q.B.D. 69, 10 App. Ca. 404.

regards port of refuge expenses, the question whether extraordinary expenditure after the entry into a port of refuge is rightly chargeable to general average necessarily depends on the circumstances of each case.<sup>1</sup>

68. The expense of the ship going into the port of refuge is in all cases general average. If she makes for port in consequence of damage to herself, which is the subject of *particular average*, and which requires, in order to her repair, that the cargo should be unloaded and warehoused, the warehousing charges are charges against cargo, and the reloading charges are charges against freight. It is also settled that the discharging charges are charged against general average, at least wherever the discharge is necessary for common safety. In *Atwood*, the Court of Appeal held that where the reason for the ship making for the port of refuge is due to a sacrifice which is itself the subject of general average, then the discharging, warehousing, reloading, and outward charges all form part of the general average claim; and in practice this judgment is followed. *Atwood's* case, while to some extent adversely criticised in *Svensden*, was distinguished from that case, on the ground that the whole expenses there might be said to reasonably flow from the original general average sacrifice; while in *Svensden* the only general average act was making for the port in order to repair. It has not been settled by the House of Lords whether, in the circumstances of *Svensden's* case, the ship's outward charges leaving the port fall to be charged against freight or against general average. The Court of Appeal held them chargeable against freight. In practice this is given effect to. Wages of the crew while at a port of refuge are not, in practice, allowed in general average.<sup>2</sup> Loss of freight under a time charter during repair of general average damage will not be allowed.<sup>3</sup>

#### SECTION 6.—ADJUSTMENT OF CONTRIBUTION.

69. A leading principle of general average is that all the parties interested in the adventure for the benefit of which the loss was incurred or the expenditure made should be sufferers by the loss in exact proportion to the extent of their respective interests, but no further.<sup>4</sup> In giving effect to this principle in the ordinary case the adjustment of general average falls to be made at the port of destination of the venture, because it is there that the extent of the benefit becomes apparent. But if the voyage is by necessity or agreement broken up at a different place, then the adjustment has to be made at that place, *e.g.* at the port of departure when the ship has had to return there.<sup>5</sup> It is a different question how the adjustment should be made when the ship

<sup>1</sup> Per Bowen, L.J. and Lord Blackburn.

<sup>2</sup> *Atwood*, *supra*; *The "Leitrim,"* [1902] P. 256.

<sup>3</sup> *The "Leitrim," supra.*

<sup>4</sup> Arnould, 2nd ed., p. 937.

<sup>5</sup> *Fletcher v. Alexander*, 1868, L.R. 3 C.P. 375.

has cargo on the voyage for different ports, but this should be according to the special circumstances so as to carry out the general principle. The law of the place of the adjustment is that by which the adjustment falls to be regulated.<sup>1</sup> But in such cases it must be proved in the action for recovery of the contribution that the adjustment has been made up in accordance with the foreign law, and the loss must be one which, according to English law, is due to a peril insured against. In order to avoid questions with the insurer, it is usual to bind insurers to accept the foreign adjustment if and as made up. The effect is to make the insurer liable for general average according to the foreign statement, whether according to English law it was due to perils insured against or not.<sup>2</sup>

70. The values of the contributing interests are taken at all events in the case of sacrifice proper, at the place of adjustment, allowance being made for the damaged state of ship or cargo. If repairs had been done, the practice is to allow a deduction of one-third for cost of new materials, unless indeed the damaged part was new. If a jettison of cargo has given rise to a claim, and from the state of the cargo the reasonable inference is that the jettisoned cargo would also have been damaged, its value is allowed for as damaged only. It is a natural extension of the same principle that if the sacrifice, though at the time effective, is followed by a total loss of the adventure before reaching its destination, there is no contribution. There has been no benefit and no extra loss. As has been already indicated when referring to the York-Antwerp Rules, it is meantime an unsettled question in English law whether or not extraordinary expenditure is allowed for where there is a subsequent total loss. In the ordinary case in practice when the venture reaches her port of destination, the adjustment of extraordinary expenditure takes place there.

71. With reference to contributions by freight, prepaid freight contributes through the merchant so far as his goods are rendered of more value by the prepayment. Freight on cargo on board contributes, but how far does chartered freight contribute when the ship has as yet received no part of the cargo on board. A ship in the United Kingdom is chartered to proceed to a foreign port and there load homewards, while liberty is given to carry cargo outwards. The ship on the outward voyage encounters perils, and there is a general average sacrifice. It is thought that the chartered freight contributes so far as the freight was of special value, *e.g.* in cases of current freights, and the shipowner therefore benefited. It is settled that chartered freight contributes if the ship was on her way to a port of loading in ballast under and to fulfil a charter.<sup>3</sup>

<sup>1</sup> *Simonds v. White*, 1824, 2 B. & C. 805.

<sup>2</sup> *Robinows & Marjoribanks v. Ewing's Trs.*, 1876, 3 R. 1134; *Harris v. Scaramanga*, 1872, L.R. 7 C.P. 481; *The "Mary Thomas"*, [1894] P. 108; *De Hart v. Compania Anonima de Seguros "Aurora"*, [1903] 2 K.B. 508 (C.A.).

<sup>3</sup> *Carisbrook Steamship Co. v. London & Provincial, &c. Co.*, [1902] 2 K.B. 681.



## SECTION 7.—RELATION BETWEEN SALVAGE AND GENERAL AVERAGE.

**72.** An ordinary case of salvage is not strictly general average, because of the principle that the sacrifice or expenditure must have been deliberately made by or on behalf of the marine adventure by someone acting as agent of the different interests, whereas the ordinary case of salvage is by independent parties. But if the master has made an arrangement for work to be done of the nature of salvage by, *e.g.* a tug at a reasonable figure, to that extent the expenditure would be of the nature of general average.<sup>1</sup>

## SECTION 8.—REMEDIES FOR RECOVERY OF GENERAL AVERAGE.

**73.** The remedies which are given to a claimant of a general average contribution are twofold :

- (a) A personal action against each contributory, and
- (b) A right of lien upon the goods salvaged.

In the case of the ship, the second remedy can easily be made effectual.<sup>2</sup> Where the claim is by the owner of goods, there is no lien on the ship, which is not in his possession, but it is said there is a lien over the goods salvaged through the master. At any rate the master is bound in the interests of the goods to take steps to have adjusted the average claims and liabilities, and to secure their payment, and will be liable if he neglects reasonably to do so.<sup>3</sup> In connection with this subject, it must always be remembered that the ship-master acts for behoof of and as the agent of the whole interests concerned.

**74.** In past times importance lay in the question how far funds could be raised by the master to meet extraordinary expenses by hypothecating or selling the cargo. This question hardly falls to be treated under the present title, while improved means of communication have deprived it of much of its interest. The master is only entitled so to raise funds in case of necessity, and he should communicate with the owner of the goods whenever practicable. When funds are raised by sale of the goods their owner has right to require repayment of their value, taking that value in his option at either the sum they have realised by the sale or their value at the port of destination. He is not bound to credit freight *pro rata itineris*,<sup>4</sup> and even if there is a total loss he can, it has been held, claim repayment of the proceeds of sale of his goods, as the case falls to be dealt with on the basis of a forced loan by the goods owner, and therefore as a case of expenditure and not one of sacrifice.<sup>5</sup>

<sup>1</sup> *Kemp v. Halliday*, 1866, L.R. 1 Q.B. 520 ; *Anderson v. Ocean S.S. Co.*, 1884, 10 A.C. 107.

<sup>2</sup> See *Huth v. Lamport*, 1885, 16 Q.B.D., 442, 735 (C.A.), as to the rights and duties of the master.

<sup>3</sup> *Crooks v. Allan*, 1879, 5 Q.B.D. 38 ; *Strang, Steel & Co. v. Scott & Co.*, 1889, 14 App. Ca. 601.

<sup>4</sup> *Hopper v. Burness*, 1876, 1 C.P.D. 137.

<sup>5</sup> *Atkinson v. Stephens*, 1852, 7 Ex. 567.



75. In practice the common law on the subject of General Average is largely affected by the York-Antwerp Rules, where, as now largely happens, these form part of the contract between those interested in the marine adventure. Farther, the practice of average adjusters does not always carry out the assumed law, and the rules which regulate their making up of adjustments need to be taken into account. Again, where foreign law regulates the adjustment, it may and does frequently affect materially the interests of those concerned. On these matters reference should be made to textbooks, which deal fully with the subject.

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## APPENDIX.

### THE YORK-ANTWERP RULES, 1890.

#### RULE I.—JETTISON OF DECK CARGO.

No jettison of deck cargo shall be made good as general average.

Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.

#### RULE II.—DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened, or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

#### RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

#### RULE IV.—CUTTING AWAY WRECK.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

#### RULE V.—VOLUNTARY STRANDING.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably sink, or drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore, shall be made good as general average. But in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

## RULE VI.—CARRYING PRESS OF SAIL—DAMAGE TO OR LOSS OF SAILS.

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average ; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

## RULE VII.—DAMAGE TO ENGINES IN REFLOATING A SHIP.

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

RULE VIII.—EXPENSES LIGHTENING A SHIP WHEN ASHORE, AND  
CONSEQUENT DAMAGE.

When a ship is ashore, and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and re-shipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

## RULE IX.—CARGO, SHIP'S MATERIALS, AND STORES BURNT FOR FUEL.

Cargo, ship's materials, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel has been provided ; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

## RULE X.—EXPENSES AT PORT OF REFUGE, ETC.

(a) When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average ; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.

(b) The cost of discharging cargo from a ship, whether at a port or place of loading, call or refuge, shall be admitted as general average, when the discharge was necessary for the common safety or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

(c) Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and storing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average.

(d) If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment, and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

#### RULE XI.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of the repairs, mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average.

#### RULE XII.—DAMAGE TO CARGO IN DISCHARGING, ETC.

Damage done to or loss of cargo necessarily caused in the act of discharging, storing, reloading, and stowing, shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

#### RULE XIII.—DEDUCTIONS FROM COST OF REPAIRS.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz. :—

In the case of **iron or steel ships**, from date of original register to the date of accident—

|                                   |   |
|-----------------------------------|---|
| Up to<br>1 year old<br>(A.)       | { All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.  |
| Between<br>1 and 3 years<br>(B.)  | { One-third to be deducted off repairs to and renewal of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets, and hawsers (other than wire and chain), awnings, covers, and painting.<br>One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, chain cables and chains, donkey engines, steam winches and connections, steam cranes and connections; other repairs in full. |
| Between<br>3 and 6 years<br>(C.)  | { Deductions as above under clause B, except that one-sixth be deducted off ironwork of masts and spars, and machinery (inclusive of boilers and their mountings).  |
| Between<br>6 and 10 years<br>(D.) | { Deductions as above under clause C, except that one-third be deducted off ironwork of masts and spars, repairs to and renewal of all machinery (inclusive of boilers and their mountings), and all hawsers, ropes, sheets, and rigging.   |

|                                    |   |
|------------------------------------|---|
| Between<br>10 and 15 years<br>(E.) | { One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.  |
| Over<br>15 years<br>(F.)           | { One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.  |
| Generally<br>(G.)                  | { The deductions (except as to provisions and stores, machinery and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions and stores which have not been in use. |

In the case of **wooden or composite ships** :—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions :—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

In the case of **ships generally** :—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving-dock dues, including expenses of removals, cartages, use of shears, stages, and graving-dock materials, shall be allowed in full.

#### RULE XIV.—TEMPORARY REPAIRS.

No deductions “new for old” shall be made from the cost of temporary repairs of damage allowable as general average.

#### RULE XV.—LOSS OF FREIGHT.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

#### RULE XVI.—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.

The amount to be made good as general average for damage or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure.



## RULE XVII.—CONTRIBUTORY VALUES.

The contribution to a general average shall be made upon the actual values of the property at the termination of the adventure, to which shall be added the amount made good as general average for property sacrificed ; deduction being made from the shipowner's freight and passage-money at risk, of such port charges and crew's wages as would not have been incurred had the ship and cargo been totally lost at the date of the general average act or sacrifice, and have not been allowed as general average ; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects, not shipped under bill of lading, shall not contribute to general average.

## RULE XVIII.—ADJUSTMENT.

Except as provided in the foregoing rules, the adjustment shall be drawn up in accordance with the law and practice that would have governed the adjustment had the contract of affreightment not contained a clause to pay general average according to these rules.

## THE ANTWERP RULE, 1903.

Rights to contribution in general average shall not be affected though the danger which gave rise to the sacrifice, or expenditure, may have been due to default of one of the parties to the adventure ; but this shall not prejudice any remedies which may be open against that party for such default.

## THE YORK-ANTWERP RULES, 1924.

## RULE A.

There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure.

## RULE B.

General average sacrifices and expenses shall be borne by the different contributing interests on the basis hereinafter provided.

## RULE C.

Only such damages, losses or expenses which are the direct consequence of the general average act shall be allowed as general average.

Damage or loss sustained by the ship or cargo through delay on the voyage, and indirect loss from the same cause, such as demurrage and loss of market, shall not be admitted as general average.

## RULE D.

Rights to contribution in general average shall not be affected though the event which gave rise to the sacrifice or expenditure may have been due to the fault

of one of the parties to the adventure ; but this shall not prejudice any remedies which may be open against that party for such fault.

RULE E.

The onus of proof is upon the party claiming in general average to show that the loss or expense claimed is properly allowable as general average.

RULE F.

Any extra expense incurred in place of another expense which would have been allowable as general average shall be deemed to be general average and so allowed, but only up to the amount of the general average expense avoided.

RULE G.

General average shall be adjusted as regards both loss and contribution upon the basis of values at the time and place when and where the adventure ends.

This rule shall not affect the determination of the place at which the average statement is to be made up.

RULE I.—JETTISON OF CARGO.

No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognised custom of the trade.

RULE II.—DAMAGE BY JETTISON AND SACRIFICE FOR THE COMMON SAFETY.

Damage done to a ship and cargo, or either of them, by or in consequence of a sacrifice made for the common safety, and by water which goes down a ship's hatches opened, or other opening made for the purpose of making a jettison for the common safety, shall be made good as general average.

RULE III.—EXTINGUISHING FIRE ON SHIPBOARD.

Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average ; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

RULE IV.—CUTTING AWAY WRECK.

Loss or damage caused by cutting away the wreck or remains of spars, or of other things which have previously been carried away by sea-peril, shall not be made good as general average.

RULE V.—VOLUNTARY STRANDING.

When a ship is intentionally run on shore, and the circumstances are such that if that course were not adopted she would inevitably drive on shore or on rocks, no loss or damage caused to the ship, cargo, and freight, or any of them, by such intentional running on shore, shall be made good as general average. But

in all other cases where a ship is intentionally run on shore for the common safety, the consequent loss or damage shall be allowed as general average.

**RULE VI.—CARRYING PRESS OF SAIL—DAMAGE TO OR LOSS OF SAILS.**

Damage to or loss of sails and spars, or either of them, caused by forcing a ship off the ground or by driving her higher up the ground, for the common safety, shall be made good as general average ; but where a ship is afloat, no loss or damage caused to the ship, cargo, and freight, or any of them, by carrying a press of sail, shall be made good as general average.

**RULE VII.—DAMAGE TO ENGINES IN REFLOATING A SHIP.**

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, in endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage ; but where a ship is afloat no loss or damage caused by working the machinery and boilers shall be made good as general average.

**RULE VIII.—EXPENSES LIGHTENING A SHIP WHEN ASHORE AND CONSEQUENT DAMAGE.**

When a ship is ashore and cargo and ship's fuel and stores or any of them are discharged as a general average act, the extra cost of lightening, lighter hire and reshipping (if incurred) and the loss or damage sustained thereby shall be admitted as general average.

**RULE IX.—SHIP'S MATERIALS AND STORES BURNT FOR FUEL.**

Ship's materials and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when and only when an ample supply of fuel had been provided ; but the estimated quantity of fuel that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be credited to the general average.

**RULE X. (a).—EXPENSES AT PORT OF REFUGE, ETC.**

When a ship shall have entered a port or place of refuge, or shall have returned to her port or place of loading, in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average ; and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place consequent upon such entry or return shall likewise be admitted as general average.

**RULE X. (b).**

The cost of handling on board or discharging cargo, fuel or stores, whether at a port or place of loading, call or refuge, shall be admitted as general average when the handling or discharge was necessary for the common safety or to enable damage to the ship caused by sacrifice or accident to be repaired, if the repairs were necessary for the safe prosecution of the voyage.

## RULE X. (c).

Whenever the cost of handling or discharging cargo, fuel or stores is admissible as general average, the cost of reloading and stowing such cargo, fuel or stores on board the ship, together with all storage charges (including fire insurance, if incurred) on such cargo, fuel or stores, shall likewise be so admitted. But when the ship is condemned or does not proceed on her original voyage, no storage expenses incurred after the date of the ship's condemnation or of the abandonment of the voyage shall be admitted as general average. In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, storage expenses, as above, shall be admitted as general average up to the date of completion of discharge.

## RULE X. (d).

If a ship under average be in a port or place at which it is practicable to repair her, so as to enable her to carry on the whole cargo, and if, in order to save expenses, either she is towed thence to some other port or place of repair or to her destination, or the cargo or a portion of it is transhipped by another ship, or otherwise forwarded, then the extra cost of such towage, transhipment and forwarding, or any of them (up to the amount of the extra expense saved) shall be payable by the several parties to the adventure in proportion to the extraordinary expense saved.

## RULE XI.—WAGES AND MAINTENANCE OF CREW IN PORT OF REFUGE, ETC.

When a ship shall have entered or been detained in any port or place under the circumstances, or for the purposes of repairs mentioned in Rule X., the wages payable to the master, officers, and crew, together with the cost of maintenance of the same, during the extra period of detention in such port or place until the ship shall or should have been made ready to proceed upon her voyage, shall be admitted as general average. But when the ship is condemned or does not proceed on her original voyage, the wages and maintenance of the master, officers, and crew, incurred after the date of the ship's condemnation or of the abandonment of the voyage, shall not be admitted as general average. In the event of the condemnation of the ship or the abandonment of the voyage before completion of discharge of cargo, wages and maintenance of crew, as above, shall be admitted as general average up to the date of completion of discharge.

## RULE XII.—DAMAGE TO CARGO IN DISCHARGING, ETC.

Damage to or loss of cargo, fuel or stores caused in the act of handling, discharging, storing, reloading, and stowing shall be made good as general average, when and only when the cost of those measures respectively is admitted as general average.

## RULE XIII.—DEDUCTIONS FROM COST OF REPAIRS.

In adjusting claims for general average, repairs to be allowed in general average shall be subject to the following deductions in respect of "new for old," viz. :—



In the case of **iron or steel ships**, from date of original register to the date of accident—

|   |  |
|---|--|
| <b>Up to<br/>1 year old<br/>(A.)</b>        | { All repairs to be allowed in full, except painting or coating of bottom, from which one-third is to be deducted.   |
| <b>Between<br/>1 and 3 years<br/>(B.)</b>   | { One-third to be deducted off repairs to and renewals of woodwork of hull, masts and spars, furniture, upholstery, crockery, metal and glassware, also sails, rigging, ropes, sheets and hawsers (other than wire and chain), awnings, covers and painting. One-sixth to be deducted off wire rigging, wire ropes and wire hawsers, wireless apparatus, chain cables and chains, insulation, donkey engines, steam steering gear and connections, steam winches and connections, steam cranes and connections and electrical machinery ; other repairs in full. |
| <b>Between<br/>3 and 6 years<br/>(C.)</b>   | { Deductions as above under clause <b>B</b> , except that one-third be deducted off insulation, and one-sixth be deducted off ironwork of masts and spars, and all machinery (inclusive of boilers and their mountings).   |
| <b>Between<br/>6 and 10 years<br/>(D.)</b>  | { Deductions as above under clause <b>C</b> , except that one-third be deducted off ironwork of masts and spars, donkey engines, steam steering gear, winches, cranes, and connections, repairs to and renewal of all machinery (inclusive of boilers and their mountings), wireless apparatus and all hawsers, ropes, sheets, and rigging.  |
| <b>Between<br/>10 and 15 years<br/>(E.)</b> | { One-third to be deducted off all repairs and renewals, except ironwork of hull and cementing and chain cables, from which one-sixth to be deducted. Anchors to be allowed in full.   |
| <b>Over<br/>15 years<br/>(F.)</b>           | { One-third to be deducted off all repairs and renewals. Anchors to be allowed in full. One-sixth to be deducted off chain cables.   |
| <b>Generally<br/>(G.)</b>                   | { The deductions (except as to provisions and stores, insulation, wireless apparatus, machinery and boilers) to be regulated by the age of the ship, and not the age of the particular part of her to which they apply. No painting bottom to be allowed if the bottom has not been painted within six months previous to the date of the accident. No deduction to be made in respect of old material which is repaired without being replaced by new, and provisions, stores and gear which have not been in use.  |

In the case of **wooden or composite ships** :—

When a ship is under one year old from date of original register, at the time of accident, no deduction new for old shall be made. After that period a deduction of one-third shall be made, with the following exceptions :—

Anchors shall be allowed in full. Chain cables shall be subject to a deduction of one-sixth only.

No deduction shall be made in respect of provisions and stores which had not been in use.

Metal sheathing shall be dealt with, by allowing in full the cost of a weight equal to the gross weight of metal sheathing stripped off, minus the

proceeds of the old metal. Nails, felt, and labour metalling are subject to a deduction of one-third.

When a ship is fitted with propelling, refrigerating, electrical or other machinery, or with insulation, or with wireless apparatus, repairs to such machinery, insulation or wireless apparatus to be subject to the same deduction as in the case of iron or steel ships.

In the case of **ships generally** :—

In the case of all ships, the expense of straightening bent ironwork, including labour of taking out and replacing it, shall be allowed in full.

Graving-dock dues, including expenses of removals, cartage, use of shears, stages, and graving-dock materials, shall be allowed in full.

#### RULE XIV.—TEMPORARY REPAIRS.

Where temporary repairs are effected to a ship at a port of loading, call or refuge, for the common safety, or of damage caused by general average sacrifice, the cost of such repairs shall be admitted as general average ; but where temporary repairs of accidental damage are effected merely to enable the adventure to be completed, the cost of such repairs shall be admitted as general average only up to the saving in expense which would have been incurred and allowed in general average had such repairs not been effected there.

No deductions “ new for old ” shall be made from the cost of temporary repairs allowable as general average.

#### RULE XV.—LOSS OF FREIGHT.

Loss of freight arising from damage to or loss of cargo shall be made good as general average, either when caused by a general average act, or when the damage to or loss of cargo is so made good.

Deduction shall be made from the amount of gross freight lost of the charges which the owner thereof would have incurred to earn such freight, but has, in consequence of the sacrifice, not incurred.

#### RULE XVI.—AMOUNT TO BE MADE GOOD FOR CARGO LOST OR DAMAGED BY SACRIFICE.

The amount to be made good as general average for damage to or loss of goods sacrificed shall be the loss which the owner of the goods has sustained thereby, based on the market values at the date of the arrival of the vessel or at the termination of the adventure where this ends at a place other than the original destination.

Where goods so damaged are sold after arrival, the loss to be made good in general average shall be calculated by applying to the sound value on the date of arrival of the vessel the percentage of loss resulting from a comparison of the proceeds with the sound value on date of sale.

#### RULE XVII.—CONTRIBUTORY VALUES.

The contribution to a general average shall be made upon the actual net values of the property at the termination of the adventure, to which values shall be added the amount made good as general average for property sacrificed, if not

already included, deduction being made from the shipowner's freight and passage-money at risk, of such charges and crew's wages as would not have been incurred in earning the freight had the ship and cargo been totally lost at the date of the general average act and have not been allowed as general average; deduction being also made from the value of the property of all charges incurred in respect thereof subsequently to the general average act, except such charges as are allowed in general average.

Passengers' luggage and personal effects not shipped under bill of lading shall not contribute in general average.

#### RULE XVIII.—DAMAGE TO SHIP.

The amount to be allowed as general average for damage or loss to the ship, her machinery and/or gear when required or replaced shall be the actual reasonable cost of repairing or replacing such damage or loss, deductions being made as above (Rule XIII.) when old material is replaced by new. When not repaired, the reasonable depreciation shall be allowed, not exceeding the estimated cost of repairs.

Where there is an actual or constructive total loss of the ship, the amount to be allowed as general average for damage or loss to the ship caused by a general average act shall be the estimated sound value of the ship after deducting therefrom the estimated cost of repairing damage which is not general average and the proceeds of sale, if any.

#### RULE XIX.—UNDECLARED OR WRONGFULLY DECLARED CARGO.

Damage or loss caused to goods loaded without the knowledge of the shipowner or his agent or to goods wilfully misdescribed at time of shipment shall not be allowed as general average, but such goods shall remain liable to contribute, if saved.

Damage or loss caused to goods which have been wrongfully declared on shipment at a value which is lower than their real value shall be contributed for at the declared value, but such goods shall contribute upon their actual value.

#### RULE XX.—EXPENSES BEARING UP FOR PORT, ETC.

Fuel and stores consumed, and wages and maintenance of master, officers, and crew incurred, during the prolongation of the voyage occasioned by a ship entering a port or place of refuge or returning to her port or place of loading shall be admitted as general average when the expenses of entering such port or place are allowable in general average in accordance with Rule X. (a).

Fuel and stores consumed during extra detention in a port or place of loading, call or refuge shall also be allowed in general average for the period during which wages and maintenance of master, officers, and crew are allowed in terms of Rule XI., except such fuel and stores as are consumed in effecting repairs not allowable in general average.

#### RULE XXI.—PROVISION OF FUNDS.

A commission of 2 per cent. on general average disbursements shall be allowed in general average, but when the funds are not provided by any of the contributing interests, the necessary cost of obtaining the funds required by means of a

bottomry bond or otherwise, or the loss sustained by owners of goods sold for the purpose, shall be allowed in general average.

The cost of insuring money advanced to pay for general average disbursements shall also be allowed in general average.

RULE XXII.—INTEREST ON LOSSES MADE GOOD IN GENERAL AVERAGE.

Interest shall be allowed on expenditure, sacrifices, and allowances charged to general average at the legal rate per annum prevailing at the final port of destination at which the adventure ends, or where there is no recognised legal rate, at the rate of 5 per cent. per annum, until the date of the general average statement, due allowance being made for any interim reimbursement from the contributory interests or from the general average deposit fund.

RULE XXIII.—TREATMENT OF CASH DEPOSITS.

Where cash deposits have been collected in respect of cargo's liability for general average, salvage or special charges, such deposits shall be paid into a special account, earning interest where possible, in the joint names of two trustees (one to be nominated on behalf of the shipowner and the other on behalf of the depositors) in a bank to be approved by such trustees. The sum so deposited, together with accrued interest, if any, shall be held as security for and upon trust for payment to the parties entitled thereto of the general average, salvage or special charges payable by the cargo in respect of which the deposits have been collected. The trustees shall have power to make payments on account or refunds of deposits which may be certified to in writing by the average adjuster. Such deposits and payments or refunds shall be without prejudice to the ultimate liability of the parties.

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## AVERSIO.

*See* SALE.

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## AVULSIO.

*See* PROPERTY.



## AWARD.

*See* ARBITRATION.

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## BACK BOND. BACK LETTER.

*See* ABSOLUTE DISPOSITION.

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## BACK TACK.

*See* HERITABLE SECURITY.

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## BACKING A WARRANT.

*See* CRIME (PROCEDURE).

## BAIL.

*See* ADMIRALTY ; CRIME.

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## BAILIARY, LETTER OF.

*See* BARON.

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## BAILIE.

*See* BURGH ; INFESTMENT.

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## BAIRNS.

*See* HEIR ; SUCCESSION.

## BAIRNS' PART OF GEAR.

*See* LEGITIM.

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## BAKEHOUSE.

*See* FACTORIES AND WORKSHOPS.

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## BALLOT.

*See* ELECTION LAW.

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## BANISHMENT.

*See* CRIME (PUNISHMENT).

# BANK: BANKER.

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## SECTION 1.—INTRODUCTORY.

### SUBSECTION (1).—*Definition of Bank.*

**76.** A bank may be described as an institution or establishment formed for the custody, exchange, sale, or lending of money, or for



facilitating the transmission of funds by means of bills, drafts, or notes.

SUBSECTION (2).—*History of Banks in Scotland.*

77. Banking in Scotland has no legal history prior to 1695. In that year the Act of the Scots Parliament (Will. III. Parl. 1, Sess. 5) (17th July 1695) was passed, incorporating the Bank of Scotland as a joint-stock bank, with the exclusive privilege of banking for twenty-one years. The privilege was not renewed at the expiration of that period. The subscribers to the joint-stock, which amounted to twelve hundred thousand pounds Scots (equal to one hundred thousand pounds sterling), were “declared to be one body corporat and politick by the name of the Governor and Company of the Bank of Scotland.” This was the first known instance in the world of a company being established by private persons for the carrying on and management of a public bank wholly unconnected with the State, and dependent upon its own capital. The bank for some time after its incorporation did not receive deposits from the public, its business consisting in the circulation of its own notes upon the credit of the subscribed capital.

78. At present, banking in Scotland is conducted by eight joint-stock banks, all of them being banks of issue, viz. : (1) the said Bank of Scotland, which in 1907 took over the business of the Caledonian Banking Company, Limited ; (2) the Royal Bank of Scotland, founded by Royal Charter, dated 31st May 1727 ; (3) the British Linen Company, founded by Royal Charter, dated 6th July 1746 ; (4) the Commercial Bank of Scotland, established in 1810, and incorporated by Royal Charter 5th August 1831 ; (5) the National Bank of Scotland, established on 21st March 1825, in terms of a contract of copartnership, and incorporated by Royal Charter, dated 5th August 1831. The two last-named banks have also been registered and incorporated under the Companies Acts. The remaining three banks, viz. the Union Bank of Scotland, Limited, the North of Scotland and Town and County Bank, Limited, and the Clydesdale Bank, Limited, have all been constituted since the year 1825, under contracts of copartnership, and have been registered and incorporated under the Companies Acts. The businesses of the North of Scotland Bank, Limited, and the Town and County Bank, Limited, were merged in 1908. There is nothing illegal or even unusual in the business of banking being carried on by private individuals or by partnerships, although the Companies (Consolidation) Act, 1908, prohibits the carrying on of the business of banking by a partnership of more than ten members unless such partnership is registered as a company under the Act.<sup>1</sup> For over fifty years there have been no private banking firms in Scotland, among the last being the house of Sir William Forbes, J. Hunter & Co., who amalgamated in 1838 with the Glasgow Union Banks, afterwards the Union Bank of Scotland, Limited.

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<sup>1</sup> Companies (Consolidation) Act, 1908, s. 1.

SUBSECTION (3).—*Banker.*

79. Although in popular language the agent in charge of each branch of a bank is spoken of as a banker, he is nothing more than a servant of the bank. The real bankers who undertake the obligations of the business carried on are the stockholders in the company or the partners in the business.

## SECTION 2.—CUSTOMER OF BANK.

SUBSECTION (1).—*Definition.*

80. It may be of importance to determine the meaning of "a customer" of a bank. It signifies a relationship in which duration is not of the essence of the contract. The essentials seem to be that the bank accepts a person's money whether on deposit or on current account and undertakes to honour cheques up to the amount standing at his credit.<sup>1</sup> It would probably be sufficient if cheques were habitually lodged with a bank for presentation on behalf of a person, whether with or without profit to the bank for so presenting them,<sup>2</sup> but the mere casual cashing of a cheque for a person introduced by a customer is insufficient.<sup>3</sup>

81. The relationship between banker and customer has been described as that of creditor and debtor and mandatary and mandant.<sup>4</sup> In reality the relationship is that of lender and borrower. Where the bank holds funds of or collects bills for the customer, the bank borrows the amount and undertakes to repay it or any part thereof, with or without interest, according to contract, against a written order of the customer, at the branch where the customer's account is kept and during banking hours, and further undertakes not to cease to do business with the customer except upon reasonable notice.<sup>5</sup>

In the famous "Mr. A." case, money which was obtained by blackmail from Mr. A. to hush up his relations with a Mrs. R. was paid by one of the blackmailers into a bank in the name of Mr. R. and then withdrawn by means of a cheque signed in name of Mr. R. Mr. R. sued the bank for the money paid in in his name; but it was held that as the money was stolen from Mr. A. and never was the property of Mr. R., and the bank was dealing with a fictitious customer, Mr. R. had no contract, was therefore not a customer of the bank, and could not maintain an action to recover part of the proceeds of the theft. The bank was accordingly assailed.<sup>6</sup>

<sup>1</sup> *Great Western Rly. Co. v. London and County Banking Co.*, [1901] A.C. 414 at pp. 420-1; *Commissioners of Taxation v. English, Scottish, and Australian Bank*, [1920] A.C. 683 at p. 687.

<sup>2</sup> *Great Western Rly.*, *supra*, pp. 422-3.

<sup>3</sup> *Commissioners of Taxation*, *supra*, p. 687.

<sup>4</sup> *London Joint Stock Bank v. Macmillan and Arthur*, [1918] A.C. 777 at pp. 789, 815, 816.

<sup>5</sup> *Jouchinson v. Swiss Bank Corporation*, [1921] 3 K.B. at p. 127.

<sup>6</sup> *Robinson v. Midland Bank*, 1925, 41 T.L.R. 170, 402.

82. Anyone may be a customer of a bank provided he is not incapable in law of attending to his affairs. A bank may refuse, without reason assigned, to accept any person as a customer, but the relationship once entered into subsists at the will of the parties and may be terminated at any time, although a bank must give notice of its intention to close its customer's account.<sup>1</sup> The notice must in the circumstances be reasonable. Having closed an account, however, the bank is bound, after making provision for outstanding cheques, to hand over the surplus to the customer on demand.<sup>2</sup>

SUBSECTION (2).—*Right of Customer in Money lodged.*

83. Although there is a right in the customer to receive back from the bank an amount of money equal to that which he has lodged there, the money once lodged ceases to be the property of the customer and becomes the property of the bank's creditors in the event of insolvency, even where the money was paid in for a definite purpose, provided specific appropriation has not taken place partially or completely before the insolvency.<sup>3</sup>

SUBSECTION (3).—*Name of the Account.*

84. The name in which an account is opened in the bank's books is sufficient notice to the banker of the ownership of the account. Thus if a person open an account at a bank in his own name as an executor of a deceased's estate, that is intimation to the banker that the sums lodged in that account belong to the customer only in trust, and these sums are not available to the bank to set off against a debit balance on the customer's own private account. Drawings from both the private and the executry account will be made on the same signature, but the cheques on the executry account should be marked as executry account. A banker is bound to honour the cheques duly signed by the executor presented on the executry account, and that is all he is bound to do. Where an account was opened with a bank in the name of the "S. Company, Limited," and a letter was given to the bank containing what purported to be a minute of a meeting of the company authorising A. and B. to sign all cheques for the company, and the "S. company, Limited," was registered two months afterwards, the bank was not liable in repetition of the money withdrawn by A. and B. either before or after the registration of the Company. The bank had fulfilled its contract and was not bound to inquire whether the company and its articles had come into existence.<sup>4</sup> As the executor is *eadem persona cum defuncto*, money paid to the deceased's bank by the executor may be retained by the bank in extinction of the deceased's debt.<sup>5</sup>

<sup>1</sup> *Prosperity, Ltd. v. Lloyds Bank, Ltd.*, 1923, 39 T.L.R. 372.

<sup>2</sup> *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110.

<sup>3</sup> *In re Barned's Banking Co.*, 1870, 39 L.J. Ch. 635; *Farley v. Turner*, 1857, 26 L.J. Ch., 710.

<sup>4</sup> *Struthers Patent Diamond Rock Co. v. Clydesdale Bank*, 1886, 13 R. 434.

<sup>5</sup> *Mitchell v. Mackersy*, 1905, 8 F. 198.



85. Where separate accounts are opened under different headings the balances in which really belong to one person or one set of persons, the various accounts may be treated by the bank, so far as the relation of debtor and creditor with its customer is concerned, as being one account, and credit balances on some of the accounts may be set off against debit balances on others.<sup>1</sup> This rule equally applies where the accounts are kept at various branches of the same bank; the bank is entitled without notice to the customer to transfer a credit balance at one branch in reduction or satisfaction of a debit balance at another.<sup>2</sup>

There is, however, no right in a customer to combine his credit balances at different branches and to draw his cheques indiscriminately on any of the branches at which he may happen to keep an account,<sup>3</sup> the branch bank being regarded as distinct from the principal bank for the special purpose of entitling a banker to refuse payment of a customer's cheque except at the branch where he keeps his account;<sup>4</sup> and there is no obligation on a banker to transfer a sum from one branch to meet a cheque drawn upon another branch at which there happens to be insufficient funds to meet it. Similarly, there is no obligation on a bank with branches abroad to pay at a branch abroad a balance due to the customer at a branch in this country.<sup>5</sup> Where a customer had an account at one branch of a bank, he was held not to be entitled to demand payment from another branch, and the refusal of that branch to pay was not a breach of any obligation on the part of the bank.<sup>6</sup>

#### SUBSECTION (4).—*Annual Balance and Accumulation of Interest.*

86. It is usual for bankers to balance their books once a year and to carry forward the credit balance or the debit balance, including interest. In the case of a debit balance the interest thereafter becomes principal and the whole sum at the debit of the customer's account will carry interest throughout the succeeding year.<sup>7</sup> When the balance is struck the customer is asked to acknowledge in some way the correctness of the balance, and his paid cheques are then delivered up to him. The effect of such acknowledgment is to put the *onus* of proving incorrect entries prior to its date upon the customer and not on the bank. The interest added to the principal sum at the customer's debit loses its character of interest, and it would appear that the cautioner liable under a cash credit bond to pay interest on the sums advanced from the date of advance will be liable for the accumulated sum, including interest upon interest, if he is also obligant for the principal sum. As was said

<sup>1</sup> *Pedder v. Mayor of Preston*, 1862, 31 L.J.C.P. 291.

<sup>2</sup> *Garnett v. M'Kewan*, 1872, L.R. 8 Ex. 10.

<sup>3</sup> *Woodland v. Fear*, 1857, 26 L.J.Q.B. 202; 7 E. & B. 519.

<sup>4</sup> *Prince v. Oriental Bank*, 1878, 3 App. Cas. 325.

<sup>5</sup> *Clare & Co. v. Dresdener Bank*, [1915] 31 T.L.R. 278.

<sup>6</sup> *Ibid.*, 2 K.B. 576.

<sup>7</sup> Bell, Prin., 32 (s).



in one case,<sup>1</sup> "The privilege of a banker to balance the account at the end of the year and accumulate the interest with the principal is founded on this plain ground of equity that the interest should then be paid, and because it is not then paid the debtor becomes thenceforth debtor in the amount as a principal sum itself bearing interest."

There is no obligation on a banker to merge for the purpose of the annual balance various accounts standing in the name of one person, and he is entitled to charge interest on any of them that are debtor irrespective of the amounts that may be at the credit of other accounts, unless there be a contract for compensating interest.

### SECTION 3.—PASSBOOKS.

87. The entries in a customer's passbook of the amounts credited or debited to his account, duly initialed by a bank official, are *prima facie* evidence against the bank. But if such entries have been made in error it is open to the bank to prove *pro ut de jure* that in point of fact the funds credited to the customer were never received by the bank.<sup>2</sup> Should the customer be induced to change his position by reason of erroneous entries to his credit—if, for example, he is led to believe that he is entitled to a sum to which he is not entitled, and consequently draws, in *bona fide*, upon the fund which appears at his credit and spends the money so received, the bank are barred from recovering from the customer the amounts so paid.<sup>3</sup> Indeed, if a customer issue a cheque on the faith of entries in his passbook and the cheque is subsequently dishonoured on the ground that the entries are erroneous, the customer may be entitled to damages.<sup>4</sup>

Where, however, there has been no alteration in the customer's position, and correction of the entries can be made without affecting the rights either of the customer or third parties, the entries are only admissions which are not conclusive and do not debar the party sought to be bound by them from shewing the real nature of the transaction which they are intended to record.<sup>5</sup>

88. The law as regards entries in a passbook as evidence against the bank seems to be the same in Scotland and England, and the basis of the rule of law rests on the application of the equitable doctrine that if one person holds out that a certain state of matters exists and another who has reason to rely on his statements acts on the belief that his statement is correct, then if loss ensue it must be borne by the person holding out the erroneous state of affairs. When one considers, however, the rule of law as regards entries in the customer's passbook as evidence

<sup>1</sup> *Reddie v. Williamson*, 1863, 1 M. 228; *Gilmour v. Bank of Scotland*, 1880, 7 R. 734; *Commercial Bank v. Pattison's Trs.*, 1891, 18 R. 476.

<sup>2</sup> *Couper's Trs. v. National Bank of Scotland, Ltd.*, 1889, 16 R. 412.

<sup>3</sup> *Holt & Co. v. Markham*, [1923] 1 K.B. 504.

<sup>4</sup> *Holland v. Manchester and Liverpool District Bank*, 1909, 25 T.L.R. 386.

<sup>5</sup> *Caden v. Newfoundland Savings Bank*, [1899] A.C. at p. 286.

against the customer, it would appear that the law of the two countries is not absolutely the same, although there seems little reason for any difference. In Scotland it has been decided that entries in a passbook of sums paid to a customer are *prima facie* evidence against him where the passbook has been in his possession and returned to the bank without objection.<sup>1</sup> In England, however, even if the customer has had the passbook in his hands for a considerable time, and even where he had returned the book to the bank without objection, the customer is not precluded from opening up the account.<sup>2</sup> It is true that an opinion has been expressed in Scotland to the effect that there is no rule of law which requires the Court to hold that a passbook is an accurate record of transactions, or that a customer is precluded from opening up transactions,<sup>3</sup> but this does not appear to affect the older rule that the passbook is *prima facie* evidence.

89. Entries in bank books other than the passbook may be used as evidence by the customer but not the banker.<sup>4</sup>

#### SECTION 4.—APPROPRIATION OF PAYMENTS TO BANKER.

90. The person paying the money has the primary right to say to what account it shall be appropriated. If he makes no appropriation, the banker has the right to appropriate. If neither of them exercises the right, then the matter is looked upon as a matter of account to see how the banker has dealt with the payment in order to ascertain how he did in fact appropriate it. And if there is nothing more than this, that there is a current account kept by the banker, or a particular account kept by the banker, then the conclusion is that the appropriation has been made, and having been made it is made once for all, and it does not lie in the mouth of the banker afterwards to seek to vary the appropriation.<sup>5</sup>

91. Where there is no special appropriation the earlier items of the account are presumed to be discharged before the later,<sup>6</sup> but this rule yields to a particular mode of dealing or express agreement which shew a different intention of parties.<sup>7</sup> In *Deeley's* case the customer of a bank mortgaged property in security of his current account. He subsequently executed a second mortgage to B., who gave notice thereof to the bank. It is usual for the bank in such cases to close the customer's account and open a new one. The bank manager forgot to do this, and the account was continued without alteration. Enough was paid in to square the balance due when B.'s notice was received,

<sup>1</sup> *Commercial Bank v. Rhind*, 1860, 3 Macq. (H.L.) 643.

<sup>2</sup> *Kepitigalla Rubber Estates, Ltd. v. National Bank of India*, [1909] 2 K.B. 1010.

<sup>3</sup> L. J.-C. Scott Dickson in *Clydesdale Bank, Ltd. v. Continental Chocolate Co.*, 1917 (unreported).

<sup>4</sup> *British Linen Bank v. Thomson*, 1853, 15 D. 314.

<sup>5</sup> *Deeley v. Lloyds Bank*, [1912] A.C. at p. 783.

<sup>6</sup> *Cory Bros. v. Owners of Turkish Steamship "Mecca"*, [1897] A.C. 286; *Clayton's case*, 1816, 1 Mer. 585.

<sup>7</sup> Bell, Prin., 563 (m) and (n).

though simultaneously advances were being made to the customer and an adverse balance remained against him. It was held that the rule of *Clayton's* case applied and therefore the mortgage to B. had gained priority over the mortgage to the bank, because the bank was not entitled to rely after notice of his mortgage on the security of the mortgage subjects for their advances, and the balance due when B.'s notice was received was extinguished by the subsequent payment and could not be founded on. The decision of the House of Lords shews that the intention of the creditor is to be gathered from his conduct in stating the accounts.

#### SECTION 5.—CHEQUES.

##### SUBSECTION (1).—*Definition.*

92. A customer operates on his account by means of cheques which have been defined as “a bill of exchange drawn on the banker payable on demand.”<sup>1</sup> A cheque is therefore an order upon a banker to pay to a person named, the bearer or order, a specified sum out of moneys deposited with the banker by the person who signs it—the customer.

##### SUBSECTION (2).—*Prescription of Cheques.*

93. No bill of exchange executed after 15th May 1772 shall be of force or effectual to produce any diligence or action in Scotland, unless such diligence shall be raised and executed or action commenced thereon within the space of six years from and after the terms at which the sum in the said bill became exigible.<sup>2</sup> The Act has been held to apply to a cheque<sup>3</sup> on the ground that the definition in s. 73 of the Bills of Exchange Act, 1882, of a cheque as a bill of exchange drawn on a banker payable on demand was merely declaratory of the common law,<sup>4</sup> and therefore in 1772 a cheque was a bill of exchange.

##### SUBSECTION (3).—*Cheque of Incapax.*

94. Where cheques are drawn by an *incapax* after the Lord Ordinary has made the appointment of a *curator bonis*, the bank is entitled to refuse payment even although there is money standing in the bank to the credit of the *incapax*.<sup>5</sup>

##### SUBSECTION (4).—*Cheques of Corporate Bodies.*

95. Bankers who have funds of a company formed under the Companies Act or of a corporation in their hands may (acting *bona fide*) lawfully honour the cheques signed according to a form sent by them to the bank without being bound previously to inquire whether the persons pretending to sign as directors have been duly appointed as

<sup>1</sup> Bills of Exchange Act, 1882, s. 73.

<sup>2</sup> 12 Geo. III. c. 72, s. 37; 33 Geo. III. c. 18, s. 35.

<sup>3</sup> *M'Craw v. M'Craw's Trs.*, 1906, 13 S.L.T. 757.

<sup>4</sup> *Vide M'Lean v. Clydesdale Bank, Ltd.*, 1883, 11 R. (H.L.) 1, per Lord Blackburn.

<sup>5</sup> *Mitchell & Baxter v. Cheyne*, 1891, 19 R. 324.



directors in conformity with the provisions of the memorandum and articles of association or the charter.<sup>1</sup> Lord Hatherley said: "A banker dealing with a company must be taken to be acquainted with the manner in which, under the articles of association, the moneys of the company may be drawn out of his bank for the purposes of the company. And the bankers must also be taken to have knowledge, from the articles, of the duties of the directors and the mode in which the directors were to be appointed. But after that, when there are persons conducting the affairs of the company in a manner which appears perfectly consonant with the articles of association, then those dealing with them *externally* are not to be affected by any irregularities which may take place in the *internal* management of the company. They are entitled to presume that that of which only they can have knowledge, namely, the external acts, are rightly done when those external acts purport to be performed in the mode in which they ought to be performed. For instance, when a cheque is signed by three directors, they are entitled to assume that those directors are persons properly appointed for the purpose of performing that function and have properly performed the function for which they have been appointed."

96. In dealing with the cheques of a corporate body, a banker, so long as the balance of the account is in favour of the customer, is bound to pay cheques properly drawn, and is justified, without any inquiry as to the purposes for which those cheques were drawn, in paying them. If, however, he allow an overdraft and it turn out that the overdraft was *ultra vires*, borrowing not being authorised by the rules or incident to the business, or that the overdraft exceeded the limits of the incorporation, the bank must take the risk. If the body has power to borrow, the banker may recover although the cheques by which the overdraft was constituted have been used for purposes to which the body had no power to devote the money.<sup>2</sup> It is well settled that the mere facts that the directors of a company have authorised a bank to pay cheques drawn in a particular manner and that this authority has been acted upon after the company's account is overdrawn, do not amount to a representation by the directors, on which personal liability can be founded, that the company had funds to meet the overdraft. Further, directors duly authorised to sign cheques of the company incur no personal responsibility to the bankers.<sup>3</sup>

#### SUBSECTION (5).—*Essentials of a Cheque.*

##### (i) *Must be in Writing.*

97. The cheque must be in writing;<sup>4</sup> but, unlike bills of exchange, cheques do not require to be drawn upon paper specially appropriated

<sup>1</sup> *Mahony v. East Holyford Mining Co.*, 1875, L.R. 7 H.L. 869.

<sup>2</sup> *Brooks v. Blackburn Building Society*, 1884, L.R. 9 App. Cas. 857.

<sup>3</sup> *Beattie v. Lord Ebury*, 1874, L.R. 7 H.L. 102; and *Wilson v. Bury*, 1880, L.R. 5 Q.B.D. 518, per Lord Justice Brett.

<sup>4</sup> Bills of Exchange Act, 1882, s. 3.



to their use. A customer may draw his cheque upon a sheet of ordinary notepaper.

(ii) *Date.*

98. A cheque need not be dated,<sup>1</sup> and is not invalid by reason of the fact that it is drawn upon a date other than that which it actually bears, or that it bears date on a Sunday. A banker, however, in a question with his customer is not entitled to cash a cheque, or debit his customer's account with the amount, on a date prior to that which the cheque bears ; and if he does so he takes the risk of the cheque being countermanded prior to its date and must indemnify his customer for any damage he may suffer by reason of the irregularity.<sup>2</sup> A post-dated cheque may, however, be negotiated for value on a date prior to that which it bears.<sup>3</sup> If the date on a cheque is altered by anyone other than the drawer the cheque is invalidated, and anyone taking such a cheque, even if he does so *bona fide* and in ignorance of the alteration, cannot recover payment thereof from the drawer.<sup>4</sup>

(iii) *Form.*

99. The cheque must contain an order to pay, and that order must be unconditional.<sup>1</sup> No special form of order need be given, but it must be expressed to imply an order given by a person entitled to give it to a person obliged to obey,<sup>5</sup> and the words "against cheque" appearing upon a cheque have no effect upon its negotiability. A mere expression of hope that the drawee will pay, or words importing a request for a loan, are not sufficient.

(iv) *Drawee.*

100. The cheque must be drawn upon a banker, *i.e.* must be addressed to a person or body of persons, whether a firm or an incorporated company, who carry on the business of banking.

(v) *Signature.*

101. The cheque must be signed by the drawer, *i.e.* the person whose account is to be debited with the amount contained in the cheque, or by someone authorised by him to sign his name,<sup>6</sup> or by someone who has authority by agreement between the banker and customer to operate on the account. The signature may be written on any part of the cheque. A banker is under no obligation to honour a cheque the signature on which differs from the signature he has been

<sup>1</sup> Bills of Exchange Act, 1882, s. 3.

<sup>2</sup> *Da Silva v. Fuller*, 1776, referred to in *Morley v. Culverwell*, 1840, 7 M. & W. at p. 178.

<sup>3</sup> *Royal Bank of Scotland v. Tottenham*, [1894] 2 Q.B. 715.

<sup>4</sup> *Vance v. Lowther*, 1876, L.R. 1 Ex. D. 176.

<sup>5</sup> *Swan v. Bank of Scotland*, 1841, 4 D. 210 ; *Glen v. Semple*, 1901, 3 F. 1134 ; *Chitty on Bills*, 110.

<sup>6</sup> Bills of Exchange Act, 1882, s. 91 (1).

authorised to honour, unless satisfactory evidence is adduced as to the authenticity of the signature.

(vi) *Amount.*

**102.** A cheque must be for a sum certain in money, and must be payable on demand. The sum to be paid may be expressed both in words or in figures, and if there is a discrepancy between the amounts so expressed, the sum payable is that expressed in words.

(vii) *Payee.*

**103.** The cheque must be made payable to a specified person or to "bearer," and must be stamped with a twopenny stamp.

SUBSECTION (6).—*Difference between Cheque and Bill.*

**104.** Although in some of its aspects it is similar to a bill of exchange, nevertheless in several respects a cheque differs from a bill.

(i) *Banker is not Acceptor.*

**105.** Cheques are not intended to be and are not in fact accepted by the banker upon whom they are drawn, and consequently no action will lie against him thereon at the instance of the holder. If the banker were a trustee of the money of his customer in his hands, it would follow that a notice of an assignment by the drawer to the payee of a portion of his funds would of itself bind the banker to pay the amount of the assignation. It has, however, long since been decided that for money deposited with a banker the customer is a creditor, and an order to pay by the customer does not confer upon the payee a right to sue the banker who refuses to pay him, since there is no privity of contract between the payee and the banker. The contract is between the banker and customer, and in the case of non-payment of his order the customer has a right to sue the banker and recover substantial damages, always assuming that there was money at his credit to meet the cheque.

(ii) *Effect of Presentation.*

**106.** In Scotland, the presentation by a payee of a cheque granted for value operates as an intimated assignation of the amount of any funds of the drawee in the hands of the bank up to the amount of the cheque, or if there are not sufficient funds at the customer's credit to meet the cheque it operates as an assignation of the balance at the customer's credit,<sup>1</sup> because, in the words of L. P. Inglis, when "it is granted for value it is a procuratory *in rem suam*, which is just one of the definitions of an assignation." In such cases the

<sup>1</sup> *British Linen Co. v. Carruthers & Ferguson*, 1883, 10 R. 923 at p. 926.

practice is to return the cheque with the marking "insufficient funds," and to place the amount standing at the credit of the customer in a separate account with reference to the cheque. After this has been done, intimation is sent to the drawer of the presentation of the cheque and the insufficiency of the funds, and also a notification that the cheque must be presented again and delivered up before the balance can be paid. But though this is the practice, the bank cannot legally refuse to make payment of a cheque if the presenter offer to deliver it up, and there be sufficient funds in the bank's hand. Where several cheques arrive through one clearing or by the same post and there are not sufficient funds to meet them all, the banker cannot at his own hand select from the cheques sufficient to exhaust the amount lying at the customer's credit and return the others. He must return all the cheques, marked "refer to drawer," and place the amount at the credit of the customer's account in a separate account with reference to the cheques. The rights of the payees would then be determined in an action of multipoleinding.

(iii) *Duty of Banker to Honour.*

**107.** A banker who is in the habit of honouring his customer's cheques to the extent to which he has funds at the customer's credit upon a current account is not entitled, without notice, at any moment to refuse to honour those cheques because there are accounts, cash and loan, which if massed together would show a debit balance. But the question arises under the 53rd section of the Bills of Exchange Act, 1882,<sup>1</sup> as to the operation of a cheque as an assignation of the funds in the drawer's hands available for payment thereof.

**108.** In considering whether the bank has or has not funds of the drawer in its hands, "the state of affairs as between the customer and the bank at any given time must be taken to be the state of affairs upon all the accounts of the customer."<sup>2</sup> If upon a balance of all the various accounts which a customer may have with a bank he is a debtor to the bank, then even if there be a balance at his credit on current account a cheque drawn on that account does not operate as an intimated assignation of funds to the credit of his current account.<sup>2</sup>

(iv) *Effect of Delay in Presentation.*

**109.** The drawer of a cheque is not discharged by the holder failing to present the cheque for payment within a reasonable time unless the drawer has been actually prejudiced by the delay. A cheque is not satisfaction of the payment of a debt until it is honoured, and unless damage has resulted from the delay the payee of a cheque may present it any time within six years. If no damage has resulted from the delay in presentation and the drawer fail to

<sup>1</sup> 45 & 46 Vict. c. 61.

<sup>2</sup> *Kirkwood & Sons v. Clydesdale Bank*, 1908 S.C. 20 L. P. D. 100.

honour the cheque he is still liable. But if the cheque is not presented within a reasonable time, looking to the facts of the particular case and to any trade usage that may exist, then, if loss is to result, it must fall upon the person failing to present the cheque within a reasonable time. The fair inference to be drawn from the Bills of Exchange Act, 1882, appears to be : If the bank fails during the period between the drawing of the cheque and the unduly delayed presentation, and at the time of such failure an amount is standing at the credit of the drawer sufficient to meet the cheque, the position as between drawer and payee is that the drawer is discharged ; but the payee may prove against the bank for the amount of the cheque. But if at the time of the bank failure the customer had no funds at his credit or had an amount insufficient to meet the cheque, then he has suffered little or no prejudice ; he is bound to pay the cheque in full if he had no funds at his credit ; and where he had an insufficient sum at his credit he is bound to pay the difference between that sum and the amount of the cheque, leaving the payee to prove for the balance against the bank. If the cheque is transferred from the payee to a third party, the transferee is, as regards the drawer, in the same position as the original payee would have been, and he must present his cheque within the time allowed to the payee ; but as between payee and transferee, the relation of drawer and payee exists as if the original payee was a drawer.

(v) *Rules as to Presentation.*

110. Apart from the reasonableness of time within which a cheque must be presented, there are various other rules governing the presentation of cheques. They must be presented to the banker within bank hours on a business day, and at his place of business, by the holder or some other person authorised to receive payment on his behalf.<sup>1</sup> A cheque payable at a branch bank is not presented by being presented at the head office.<sup>2</sup> A cheque may be presented by medium of the post office if there is a trade usage to that effect, and in that event a sender is not liable for delays in the post office. If the letter containing the cheque has been properly delivered to the post office for transmission, presentation will be held to have been duly made when the cheque was posted.<sup>3</sup>

(vi) *Countermand of Cheque.*

111. Cheques, unlike bills of exchange, may be countermanded.<sup>4</sup> This may be done either by the drawer giving notice of the countermanding of his authority to the banker, or by the drawer's death or insanity being intimated to the banker. If a banker honour a cheque after the death of the drawer he will escape liability if it is

<sup>1</sup> Bills of Exchange Act, 1882, s. 45 (3).      <sup>2</sup> *Woodland v. Fear*, 1857, 7 E. & B. 519.

<sup>3</sup> *Higgins & Sons v. Dunlop & Co.*, 1847, 9 D. 1407.

<sup>4</sup> *Reade v. Royal Bank of Ireland*, [1922] 2 I.R. 22.



shown that through no fault of his the knowledge of the customer's death has not reached him. A cheque may be, though it is not necessarily, countermanded by telegram,<sup>1</sup> and a banker receiving notice of countermand by telegram may postpone honouring any cheque presented to him after receipt of such notice until further inquiry can be made, and before confirmation. It is always a question of circumstances whether the authenticity and meaning of the telegram are sufficiently brought to the banker's knowledge so as to make it unreasonable that he should not act on the telegram.<sup>2</sup> It would seem that one partner may countermand payment of a cheque drawn by another partner on the firm account, and that a banker incurs no liability to the firm in acting upon such countermand.<sup>3</sup> Where a cheque has been granted but before presentation within a reasonable time the drawer has died, it seems that although the banker must refuse to honour the cheque, nevertheless the cheque operates as a good assignation of a portion of the customer's money to the payee in a question between such payee and the deceased's representatives.<sup>4</sup>

112. Although, in a question between the drawer and banker, a cheque may be countermanded, a cheque given for value cannot in a question between drawer and payee be countermanded,<sup>5</sup> the principle being that stated by Lord Rutherford: "The bill passes the fund because it is an irrevocable order or mandate to pay addressed to parties who have a fund of the drawer in hand, and if they had such a fund when the document was presented to them it operates as an assignment, for they hold the fund no longer for the drawer but they hold it for the payee alone." If the cheque has been granted on condition that it is not to be used except on the occurrence of a certain event and that event does not happen, then, even if given for value, it may be countermanded.<sup>6</sup> A payee of a cheque granted for value which has been countermanded by the drawer cannot sue an action in his own name against the bank, which is bound by the last instructions received from the drawer.<sup>7</sup> The payee may either raise an action of multiplepinding, with the amount alleged to have been assigned by the cheque as the fund *in medio*, or he may raise an ordinary action on the debt which the amount contained in the cheque would have paid.

113. Where the payee has paid a cheque which has been countermanded into his own bank, either to reduce the debit balance against him or to increase his credit balance, the payee's bankers are holders for value and may raise any proceedings competent to the original payee and sue the drawer.<sup>8</sup>

<sup>1</sup> *Curtice v. London City and Midland Bank*, [1908] 1 K.B. 293.

<sup>2</sup> *Reade v. Royal Bank of Ireland*, [1922] 2 I.R. 22.

<sup>3</sup> *Lindley on Partnership*, 7th ed., 158.

<sup>4</sup> *Bank of Scotland v. Reid*, 1886, 2 S.L. Rev. 376.

<sup>5</sup> *Watt's Trs. v. Pinkney*, 1853, 16 D. 279 at p. 288.

<sup>6</sup> *Fortune v. Luke*, 1831, 10 S. 115.

<sup>7</sup> *Waterston v. City of Glasgow Bank*, 1874, 1 R. 470 at p. 480.

<sup>8</sup> *M'Lean v. Clydesdale Bank*, 1883, 11 R. (H.L.) 1.

## SECTION 6.—CROSSED CHEQUES.

SUBSECTION (1).—*Definition.*

114. The crossing of a cheque operates as an intimation by the drawer to his banker that payment is only to be made in a particular way. The crossing may be either general or special.

SUBSECTION (2).—*General Crossing.*(i) *How and by Whom may be effected.*

115. A cheque is crossed generally when it bears on the face of it two parallel transverse lines with or without the addition of “& Co.” and with or without the words “not negotiable.”<sup>1</sup> A cheque may be crossed by the payee as well as the drawer. The crossing on a cheque is a material part of it, and cannot be altered otherwise than is authorised by the Bills of Exchange Act.

(ii) *Effect of General Crossing.*

116. By crossing a cheque generally a direction is given to the banker that payment must only be made through a bank, and at the same time intimation is made to the holder that he can only receive payment in the same way. A banker who pays a cheque crossed generally otherwise than to a banker is liable to the true owner of the cheque for any loss which he may sustain owing to the cheque having been so paid.<sup>2</sup> In other words, a banker who pays to a thief or a finder an uncrossed cheque payable to bearer is protected, as there is no obligation on him to see that the person who presents such a cheque for payment has come by it honestly. A banker paying a cheque payable to order is protected if he pay upon an endorsement which purports to be signed by the person entitled to the cheque or by his authority. But a banker who pays to a thief or a finder or upon an unauthorised endorser the amount contained in a cheque in disregard of a crossing, whether general or special, is in a different position in that he is liable to the true owner, whether the drawer or subsequent transferee, if that true owner can prove that he has suffered loss by the cheque having been so paid.<sup>3</sup>

117. It will, therefore, be seen that there is nothing to prevent a banker paying out the amount contained in a crossed cheque provided he is satisfied that the presenter is the person to whom it is payable. If, on the other hand, the banker prove to have been mistaken in the identity of the person presenting the cheque and to have paid the money to someone not entitled to it in disregard of a crossing, he is liable for damages even if he has acted honestly and in good faith, for

<sup>1</sup> Bills of Exchange Act, 1882, s. 76.

<sup>2</sup> *Ibid.*, s. 79 (2).

<sup>3</sup> *Smith v. Union Bank of London*, 1875, 1 Q.B.D. 31.

he has disobeyed the mandate. A banker who receives a cheque through the medium of a clearing-house may, of course, pay it even if crossed and if it bear no banker's stamp, because such a cheque can only have come through a bank and the payment is payment to a banker.

**118.** A banker who without negligence and in good faith makes payment to a banker of the amount contained in a crossed cheque is entitled to debit his customer with the amount so paid whether it has been paid on behalf of the true owner or not: that is to say, if he obey the direction given by the crossing *bona fide* and without negligence, he is not responsible to the drawer though it turn out that the person on whose behalf the payment was made was not the true owner.<sup>1</sup> The drawer of a cheque so paid is absolved from liability in a question with his payee, provided the cheque has reached the payee and has been lost by or stolen from him. And the payee must seek his remedy against the person who has received the payment, and has no action against either banker or the drawer.<sup>2</sup>

### (iii) *Protection of Banker.*

**119.** Sec. 82 of the Bills of Exchange Act affords a certain protection to the collecting banker in the case of crossed cheques. The banker who receives for collection and collects payment of a cheque crossed generally or to himself incurs no liability to the true owner should it subsequently appear that the person for whom the cheque was collected had no title to the cheque, provided the collecting banker act in good faith and without negligence. To bring such a case within the protection afforded by s. 82 of the Bills of Exchange Act, the following facts must co-exist: (1) The person for whom the cheque is collected must be a customer of the bank; (2) the bank must collect the proceeds of the cheque for that customer; and (3) the cheque must be collected and paid without negligence. The *onus* is on the banker to prove that he was not negligent, and negligence is a question of fact. The test to be applied is whether the transaction of paying in a cheque, taken with the circumstances antecedent and present, is so out of the ordinary course as to be such as would have aroused doubt in the banker's mind and caused him to make inquiries,<sup>3</sup> and Lord Dunedin points out that "the standard is to be derived from the ordinary practice of bankers, not individuals." The question of good faith does not enter into consideration in judging of the banker's liability for negligence. Even where it is obvious that the banker did act in good faith, yet, if he has been in the slightest degree negligent in the collecting of the cheque, the true owner of the cheque will have a good ground of action

<sup>1</sup> Bills of Exchange Act, 1882, s. 80.

<sup>2</sup> *Matthiessen v. London County Bank*, 1879, 5 C.P.D. 7.

<sup>3</sup> *Morison v. London County and Westminster Bank*, [1914] 3 K.B. 356; *Commissioners of Taxation v. English, Scottish, and Australian Bank*, [1920] A.C. 683 at p. 689.



against him if it be shewn that by such negligence some unauthorised person has been enabled to get possession of the proceeds of the cheque, to the injury of the true owner.<sup>1</sup>

120. Until the passing of the Bills of Exchange (Crossed Cheques) Act of 1906,<sup>2</sup> a banker who received for collection a cheque and before he had collected it placed the amount to the customer's credit, and allowed him to draw upon it, was not entitled to the benefit of s. 82 of the Bills of Exchange Act, 1882, as he was then a holder for value and was collecting the cheque not for his customer but for himself.<sup>3</sup> By the Act of 1906, however, it is declared that a banker still receives payment for his customer within the meaning of s. 82, even if he credits his customer's account before he actually receives payment of the cheque.

(iv) *Effect of Payment into Customer's Account.*

121. Where a customer pays a crossed cheque into his bank, the question whether the bank receives it as a holder for value or as an agent for collection is a pure question of fact. The fact that the cheque is immediately credited in the ledger does not necessarily make the bank a holder for value. That inference may be rebutted by notices in the passbook and pay-in slip or other evidence shewing that the customer could not draw before clearance. If the bank receive the cheque as agent for collection and stop payment before it is finally cleared at the clearing-house, it can only receive and hold the proceeds as collecting agent for its customer, and not on the ordinary bank relationship of debtor and creditor. Consequently if the facts establish that the bank has stopped business before a crossed cheque has been cleared, although it is cleared shortly before an actual winding-up, the liquidator must pay the full proceeds of the cheque to the customer.<sup>4</sup>

122. Where cheques are drawn payable to and endorsed by a public official, that fact should put the bank cashier upon inquiry whether a private customer is entitled to the cheques. The crediting of cheques to a private individual in such circumstances without any inquiry has been held to be negligence on the part of the bank's cashier, and s. 82 did not protect the bank.<sup>5</sup>

123. If a bank, through its agent, knowingly becomes a party to a misapplication of what are trust funds it must restore the sums so misapplied. It was so held where the bank agreed with its customer to furnish his agent with cash in exchange for drafts upon the customer which the bank knew were to be used in paying for grain to be purchased

<sup>1</sup> *Hannan's Lake View Central v. Armstrong & Co.*, 1900, 16 T.L.R. 236; *Underwood, Ltd. v. Bank of Liverpool and Martins, Ltd.*, 1923, 39 T.L.R. 606.

<sup>2</sup> 6 Edw. VII. c. 17.

<sup>3</sup> *Capital and Counties Bank v. Gordon*, [1903] A.C. 240.

<sup>4</sup> *In re Farrow's Bank*, [1923] 1 Ch. 41; *vide also Underwood, Ltd. v. Bank of Liverpool and Martins, Ltd.*, [1924] 1 K.B. 775.

<sup>5</sup> *Ross v. London County, Westminster, and Parr's Bank, Ltd.*, [1919] 1 K.B. 678; see also *Hampstead Guardians v. Barclay's Bank*, 1923, 39 T.L.R. 229.



for the customer by its agent, but instead of so furnishing cash the bank credited the drafts to the agent's private account, which was generally overdrawn, and from which he drew cheques for his own purposes.<sup>1</sup>

124. If cheques be obtained by fraud and then transferred by the fraudulent holder to a transferee without consideration, the transferee acquires no better title to hold them than the fraudulent holder had, and the bank which has paid the cheques can recover the amount thereof.<sup>2</sup> There is also high judicial support for the proposition that if the fraudulent holder or his gratuitous transferee pays the cheques into a banking account, the bank which has paid the cheque as the true owner of the money has the right to follow and recover the proceeds or so much thereof as remains to the credit of the account provided the proceeds can be traced.<sup>3</sup>

#### SUBSECTION (3).—*Special Crossing.*

125. A cheque is crossed specially which bears across its face the name of a banker. By crossing a cheque specially a direction is given to the banker upon whom it is drawn to pay only to the banker whose name appears on the face of the cheque, or to his agent for collection being a banker. If a banker disregard the directions so implied in the special crossing of a cheque, the liability he incurs is the same as his liability for disregarding the direction contained in a general crossing. The words "not negotiable" added to a crossing have no further effect except that a person taking such a cheque can take no higher title than the person from whom he received it, and accordingly no one can be "a holder in due course" in the strict sense of the word of such a cheque. But the banker's liability is in no way increased by such addition. A holder of such a cheque who takes it from a thief or a finder, even if he act *bona fide* and in ignorance of any want of title in the person from whom he receives it, has no better right to receive payment than a person who receives a crossed cheque the endorsement on which has been forged.

#### SECTION 7.—ALTERED CHEQUES.

126. A banker is bound to honour his customer's cheques if presented to him within banking hours, and if he have funds belonging to that customer in his possession. If he refuse to do so, he will be liable in damages to his customer. As between banker and customer, the alteration of a cheque does not necessarily void it. Thus a banker who pays the full amount of a cheque, the sum in which has been increased through no fault or negligence of the customer, may still debit the customer's account with the amount of the cheque before alteration.<sup>4</sup>

<sup>1</sup> *British America Elevator Co. v. Bank of British North America*, [1919] A.C. at p. 658.

<sup>2</sup> *Banque Belge pour L'Étranger v. Hambrouck*, [1921] 1 K.B. 321.

<sup>3</sup> *Ibid.*, pp. 330 and 333; *Sinclair v. Brougham*, [1914] A.C. 398 at pp. 420, 436.

<sup>4</sup> *Hall v. Fuller*, 1826, 5 B. & C. 750.

Where, however, the real cause of the overpayment has been the fault or negligence of the customer, as where he draws his cheque with such carelessness as to allow of an alteration being easily made, the banker will be entitled to debit his account with the full amount of the cheque,<sup>1</sup> for there is an obligation on the customer to use ordinary care in the drawing of his cheques. As was said in the case cited: "It is beyond dispute that a customer is bound to exercise reasonable care in drawing the cheque to prevent the banker being misled. If he draws the cheque in a manner which facilitates fraud he is guilty of a breach of duty as between himself and the banker, and he will be responsible to the banker for any loss sustained by the banker as a natural and direct consequence of this breach of duty . . . If the cheque is drawn in such a way as to facilitate or almost to invite an increase in the amount by forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence of this description." The responsibility for the cheque between its signature and its presentation is not to be laid upon the banker. The customer's duty to the bank and the bank's obligation to the customer meet at the presentation of the cheque. It is to be observed that the customer's neglect must be in the transaction itself.<sup>2</sup>

127. The banker must also, however, use care, and if he pay the amount contained in a cheque which bears obvious marks of having been tampered with, he will not be entitled to debit his customer's account with the amount so paid. Where there is no negligence on the part of the banker or of the customer, the ordinary rule, that where one of two innocent parties must suffer from the fraud of a third, he who has given the opportunity for the commission of the fraud must bear the loss, will apply.<sup>3</sup>

#### SECTION 8.—FORGED CHEQUES.

128. A banker who pays on a forged endorsement on a cheque, provided he has acted without negligence and in good faith, is protected from action by the real holder. But no matter how carefully he may act he cannot escape liability to his customer if he cashes a cheque the signature to which has been forged, unless he can shew that the customer by his actings has debarred himself either from setting up forgery or from denying that he authorised his signature to be appended to the cheque. The mere losing or carelessly mislaying of a cheque book by a customer are not such actings as will prevent him pleading forgery,<sup>4</sup> because as already explained the carelessness must be in the transaction itself.

129. Silence on the part of the customer after the forgery or possibility of forgery has been brought to his notice may in some circum-

<sup>1</sup> *London Joint Stock Bank v. M'Millan and Arthur*, [1918] A.C. 777.

<sup>2</sup> *Swan v. North British Australasian Co.*, 1862, 2 H. & C. 175 at p. 181.

<sup>3</sup> *Lickbarrow v. Mason*, 1787, 2 T.R. 63 at p. 70; *Waldron v. Sloper*, 1852, 1 Drew. 193.

<sup>4</sup> *Bank of Ireland v. Evan's Charities*, 1855, 5 H.L.C. 389.

stances bar him from setting up the forgery, *e.g.* where his silence was the means of allowing the forger to escape and of prejudicing the holder of the cheque.<sup>1</sup> But silence will not always bar the customer. It will only do so when there is a duty to speak, as where the customer, becoming aware that a forgery has been committed, delays to inform his banker, and by his delay causes prejudice to his bank or to the holder of the forged document. In such a case he will be barred from repudiating liability.<sup>2</sup>

**130.** If the customer whose name has been forged lead the bank to believe that the signature is genuine, and by so doing prevent the bank from taking steps to recover the money paid, the customer in a question with the bank will not be heard to repudiate his representation by setting up the forgery. It would, however, be no bar to criminal proceedings against the forger or a civil action by the customer against him for the return of the money withdrawn from his account by means of the forgery. If a customer be really afforded an opportunity of examining a cheque and, having done so, he fails to repudiate its genuineness, and if by his actings the person who has given value for the cheque is prejudiced to the extent that he loses his opportunity of compelling the forger to return the money, the customer will be held to have adopted the signature and will be precluded from setting up the plea of forgery in a question with that person.<sup>3</sup> Further, there may be circumstances surrounding the payment of former forged cheques by the same party, and to the same bank, which would bar repudiation of the signature honoured in similar circumstances.<sup>4</sup>

**131.** The mere fact that the apparent drawer of the cheque takes no notice of letters addressed to him by the bank in relation to a doubtful cheque, but not intimating that the bank hold him liable therefor, will not necessarily debar him from denying the genuineness of the signature,<sup>1</sup> and still more is a person entitled to disregard the letters of those to whom he stands in no special relation. So if a person receive notice from a bank, of which he is not an actual customer, that a bill purporting to bear his signature lies at that bank under protest for non-payment, and he either fails to answer the letter or fails to acquaint the writer that his signature to the bill has been forged, he does not by his actings entitle the writer of the letter to set up a plea of homologation.<sup>5</sup> Lord Kyllachy in *Cowan's* case described as novel the proposition "that although the defender was not even the bank's customer and owed them no duty beyond that which he owed to every member of the public, he was yet bound to answer their notices and, not doing so, must be held to have adopted the previous bills and by anticipation also

<sup>1</sup> *Warden v. British Linen Bank*, 1863, 1 M. 402.

<sup>2</sup> *M'Kenzie v. British Linen Bank*, 1881, 8 R. (H.L.) 8.

<sup>3</sup> *Findlay v. Currie*, 1850, 13 D. 278; *Boyd v. Union Bank*, 1854, 17 D. 159.

<sup>4</sup> *Boyd, supra*, at p. 161; *Morris v. Bethell*, 1869, L.R. 5 C.P. 47; *Barber v. Gingell*, 1800, 3 Espin. 60.

<sup>5</sup> *British Linen Bank v. Cowan*, 1906, 8 F. 704.



adopted the subsequent bill to which the action related.” Mere silence without anything more is not enough to constitute adoption, but when intimation is given to the customer that he is regarded as responsible when he finds that his name is being forged to cheques by the same drawer it becomes his duty to repudiate the cheque.<sup>1</sup>

132. The law as to forged signatures may be briefly summed up as follows: *prima facie* the bank cannot debit a customer with the amount of a cheque which he did not draw, or which he did not authorise, and from which he has derived no benefit; but if the customer, with full knowledge, negligently and culpably stand by and allow someone to act on the faith of the genuineness of the signature which he could contradict, and so allow that person to alter his position for the worse, the customer cannot afterwards dispute the signature in an action against the person whom he himself so assisted to deceive; and, on the principle that a gratuitous benefit cannot be taken of a fraud, where a cheque is forged without the customer's knowledge by his agent, and where the customer obtains a benefit thereby, he is bound to repay the bank which has honoured his cheque.<sup>2</sup> Negligence in the transaction itself, or omission where there is an obligation cast upon the customer by trade or other use to disclose the truth, may take the place of active conduct, as founding a plea of personal bar or homologation.

#### SECTION 9.—FAILURE TO PRESENT BILL.

133. Where a bank is employed to present a bill for payment and fails to do so, it will be liable in all the damages which are the direct consequences of its breach of contract. Accordingly, where a bank so employed had failed to present the bill within business hours, but returned it to the creditor as duly protested, with the result that he sequestered the debtor's effects and was found liable in damages for wrongous sequestration, it was held that the creditor could recover from the bank the damages in which he had been found liable and the expenses he incurred in defending the action.<sup>3</sup>

#### SECTION 10.—DEPOSIT RECEIPTS.

##### SUBSECTION (1).—*Nature and Form.*

134. Where a person lodges money with bankers without intending that it should be drawn on from time to time by cheques, it is a common practice for the bankers to allow interest on the money so deposited, and they give to the depositor a receipt for his deposit. The deposit may be repayable on demand or upon a given notice, and the interest it carries may be fixed for the period of the deposit or it may vary, as is usually the case, with a fluctuating bank rate. A deposit receipt is

<sup>1</sup> *Brown v. British Linen Bank*, 1863, 1 M. 793.

<sup>2</sup> *Clydesdale Bank v. Paul*, 1877, 4 R. 626.

<sup>3</sup> *Houldsworth v. British Linen Co.*, 1850, 13 D. 376.



not a negotiable instrument. It is, in the words of Lord Dunedin,<sup>1</sup> “a contract in which the bank promises to pay upon a certain order, but it does not give any indication as to the person to whom the money really belongs after it has been paid—that may be proved in other ways.”

SUBSECTION (2).—*Duty of Banker.*

**135.** The banker's obligation on a deposit account is that of a debtor to his creditor, and is to pay the money to the person named therein or in accordance with his instructions. A person in possession of an endorsed deposit receipt has not necessarily right to receive payment of the amount deposited. A bank paying to such a person may be called upon to pay again to the depositor where the signature is forged, or even where the signature is genuine, if it is established that the holder of the document is not in fact authorised to receive payment. The depositor, however, might be precluded from maintaining an action against the bank if, through his own negligence in the matter itself, payment had been made by the bank to one unauthorised to receive payment.<sup>2</sup> Provided the bank acts on its contract in good faith it has no concern with any questions between third parties.<sup>3</sup> The person entitled in a question with the bank to uplift a deposit receipt is not necessarily the beneficial owner of the money: the obligation of the bank is to pay as contracted for.

As a banker is accountable to his depositor, it is his duty to satisfy himself as to the identity and *bona fides* of the person to whom payment is made. In the case of repayment being made to the wrong person the bank is liable to the depositor, and mere production of the deposit receipt by the known agent of the party in whose favour it was granted is not implied authority to the bank to pay him.<sup>4</sup>

**136.** A banker cannot refuse to repay a deposit receipt in name of “A. or B. or the survivor” if it is duly presented endorsed by one of the holders. This obligation was enforced, even where the bank had accepted the other holder as a co-obligant in a cash credit bond on the security of the sum contained in the receipt,<sup>5</sup> because when a bank gives an unequivocal document binding it to pay to two people or either of them it cannot destroy the terms of the receipt and the rights of one party by a course of dealing with the other. Where, however, a deposit receipt was in similar terms, and C. raised an action against A. for declarator that the sum in the receipt belonged to C., the bank were stated not to be in safety in repaying the deposit to B. on his endorsement, the sum in the receipt having been arrested on the dependence of the action between C. and A.<sup>6</sup> because no inference could be

<sup>1</sup> *Dickson, infra*, at p. 53.

<sup>2</sup> *Wood v. Clydesdale Bank*, 1914 S.C. 397.

<sup>3</sup> *Dickson v. National Bank of Scotland*, 1917 S.C. (H.L.) 50.

<sup>4</sup> *Forbes' Ex. v. Western Bank*, 1854, 16 D. 807.

<sup>5</sup> *Anderson v. North of Scotland Bank*, 1901, 4 F. 49.

<sup>6</sup> *Allan's Ex. v. Union Bank of Scotland*, 1909 S.C. 206.

drawn from the terms of the deposit receipt as to the ownership of the money.

137. The sum contained in a deposit receipt is not available as a fund against which the banker is bound to honour cheques. The possession of an endorsed deposit receipt is nothing more than a mandate to uplift the fund on behalf of the owner, and such a mandate must be intimated to the bank. If this be the sound view, it would seem on principle that it falls with the death of the granter, and payment cannot be made to the mandatary after the death of the owner.<sup>1</sup> Endorsation is not a known legal method of assignation apart from the privilege of negotiability, but is merely a mandate to the endorsee to draw, and the bank to pay, the amount, which like other mandates falls, it is submitted, on the death of the mandant.

#### SUBSECTION (3).—*Prescription of Deposit Receipts.*

138. The practice of Scottish banks is to waive the plea of the long negative prescription in the case of deposit receipts.<sup>2</sup> The deposit in bank in his own name as trustee under a voluntary trust deed for creditors in 1834 of a dividend due to a sequestrated estate does not fall under ss. 2 and 7 of the Court of Session Consignations (Scotland) Act, 1895, as forthwith payable to the King's and Lord Treasurer's Remembrancer. But where it had been so paid over, it was held that the person *in titulo* could not be met by the plea of prescription put forward by the Remembrancer, seeing that the pursuer sued as a beneficiary having an interest in an extant fund impressed with a trust in his favour.<sup>3</sup>

### SECTION 11.—LETTERS OF CREDIT.

#### SUBSECTION (1).—*Definition.*

139. Letters of credit are mandates giving authority to the person addressed to pay money or furnish goods on the credit of the writer. They are made use of extensively for facilitating the supply of money abroad without the risk attendant on the traveller carrying about large quantities of specie or buying bills to a greater amount than may be required.<sup>3</sup> A letter of credit is not a negotiable instrument, and the only person entitled to receive money on the faith of it is the person named in it.

#### SUBSECTION (2).—*General Letters.*

140. A general letter of credit is addressed to no specified person, and gives authority to anyone to whom it may be presented to give credit to the person named in it, indemnification of such payments being

<sup>1</sup> *Barstow v. Inglis*, 1857, 20 D. 230 at p. 237.

<sup>2</sup> *Bertram's Tr. v. King's Remembrancer*, 1920 S.C. at p. 563.

<sup>3</sup> Bell, Com. (M'L. ed.), i. 389.

guaranteed by the writer of the letter. The amount of credit to be given may be fixed or it may be unlimited, and the time during which the letter is to have currency may also be limited. The writer of the letter is only liable if the conditions contained in it are strictly complied with by the person giving credit.<sup>1</sup> The person to whom the letter is addressed is under a duty to see that the person named in the letter is the person to whom payment is made. Accordingly where payment is to be made by the method of honouring cheques, if it is made upon a forged cheque it is not payment under the letter of credit, and except perhaps in the case of want of caution on the part of the holder of the letter payments so made cannot be recovered from the writer of the letter.<sup>2</sup>

#### SUBSECTION (3).—*Special Letters.*

**141.** Special letters of credit are addressed to specified individuals, and apart from that are in the same position as general letters; they are generally issued against a deposit of cash or security. The contract is simply one of the deposit of money which the receiver is bound to repay abroad through a banker whose name is given in the letter of indication.

#### SECTION 12.—BANK NOTES.

**142.** Bank notes are promissory notes issued by bankers and payable on demand. At one time private individuals could issue notes, and in a sense they still can by issuing promissory notes. Banks are now, however, restricted to issuing bank notes in multiples of £1,<sup>3</sup> and only bankers who on 6th May 1844 were issuing notes are now entitled to issue bank notes.<sup>4</sup> By a later statute<sup>5</sup> only the Bank of England can issue notes of a higher value than one hundred pounds. The Scottish banks are not allowed to have in issue, on the average over any one period of four weeks, a larger amount of notes than the amount authorised under 8 & 9 Vict. c. 38, plus the amount of gold and silver coin held by such bank at its head office or place of business during the same period of four weeks. Bank notes are exempt from the application of the sexennial prescription but they might be held to fall under the long negative prescription. The shareholders of an issuing bank, although the bank may be a limited company, are not limited as regards their liability for note issue. It would appear that in insolvency the note holders must be paid by the shareholders and the creditors rank on the assets available for distribution; the note holders are really in the position of secured creditors, the personal guarantee of the shareholders of the bank being behind them, except as limited by the articles of association in the case of certain banks.

<sup>1</sup> *British Linen Co. v. Caledonian Insurance Co.*, 1861, 4 Macq. 107; *Union Bank of Canada*, 1877, 47 L.J.C.P. 100.

<sup>2</sup> *Orr v. Union Bank of Scotland*, 1852, 24 Jur. 196; 1854, 17 D. (H.L.) 24.

<sup>3</sup> 8 & 9 Vict. c. 38.

<sup>4</sup> 7 & 8 Vict. c. 32.

<sup>5</sup> 54 & 55 Vict. c. 39, s. 29.



## SECTION 13.—SECURED LOAN ACCOUNT.

SUBSECTION (1).—*Duty of Bank as to Securities.*

143. Unless otherwise agreed, expressly or impliedly, a bank is bound to deal with shares made over by a borrower in security of his advance in the same way as any ordinary individual lender on such security would be bound to do. The bank would be bound to hold the shares exclusively against the advances to him which they had been made over to secure, and, if the advance be repaid, to hand back the identical shares which were made over.<sup>1</sup> There is, however, a custom or practice followed by banks that when a customer wants to open a secured loan account he may himself transfer to the bank's nominees shares already registered in his own name, or he may arrange through his brokers that the person from whom he has purchased shares shall transfer these to the bank's nominees. In both cases the shares are specific shares, identified and distinguished by number; but while the customer is credited in the securities register kept by the bank with a corresponding quantity of shares of the same denomination, his specific numbered shares become immixed with and merged in the mass of similar shares held by the bank through its nominees. All trace of identity may thus be lost, for the transactions recorded in the securities register are too many and complicated to allow of tracing the identity of every particular transfer with a corresponding credit entry in the register. When the customer repays his loan, in whole or in part, and claims return or release of all or some of his shares, the requisite quantity of shares standing to his credit in the securities register is taken out of the mass and transferred to him; but the particular shares thus transferred are not necessarily the identically numbered shares which he originally gave to the bank in security. The chances are that those particular shares have already been transferred to other customers, who also had secured loan accounts against shares of the same denomination and whose demands for transfer of their shares have been met by means of those particular shares.<sup>1</sup> If a customer knows and acquiesces in the said practice he will be held to have surrendered his right to the return of his specific shares on repayment of the loan.

SUBSECTION (2).—*Delivery Letters.*

144. This custom is known to brokers, who themselves often have secured loan accounts,<sup>2</sup> and it is often convenient, where perhaps the clients have not sufficient cash to carry out the transactions into which they enter, that a quantity of shares standing to the credit of A., the selling broker, should be transferred to the credit of B., the purchasing broker, in the securities register. This is done by means of a "delivery

<sup>1</sup> *Crerar v. Bank of Scotland*, 1921 S.C. 736.

<sup>2</sup> *National Bank of Scotland v. Dickie's Tr.*, 1895, 22 R. 740.



letter" addressed to the bank. The result is that B. gets the same financial facilities as A.: the mass of the shares held by the bank remains the same, and it is impossible to say which particular shares are now held for B. Again, a broker may have a client who has a secured loan account, and is a seller of shares held thereunder by the bank which another client wishes to purchase under a secured loan account; all he has to do is to address a "delivery letter" to the bank, instructing that a quantity of shares out of those standing to the credit of the seller are to be held for the purchasing client.

145. If the knowledge of the custom or practice of dealing which the system already described implies be brought home to the borrower, it is sufficient to establish agreement to participate in and be bound by it, and he will be barred from asking more than a retransfer of an equivalent number of the particular shares pledged to the bank.<sup>1</sup>

#### SECTION 14.—BANKER'S LIEN.

##### SUBSECTION (1).—*Extent of Lien.*

146. A banker has a general lien over all unappropriated negotiable instruments belonging to his customer which are lawfully in his possession and subject to his control, but only for balances due to the banker on general account, and not for ordinary debts due to the banker in any other capacity,<sup>2</sup> unless there be a clear contract to the contrary.<sup>3</sup> This is his common law right of lien, but it may be extended by agreement with his customer. In Scotland it applies only to negotiable securities, in which respect the law is different from that of England.

##### SUBSECTION (2).—*Conditions of Exercise.*

147. To entitle a banker to exercise his right of lien it is essential: (1) That the customer's property be actually in the banker's possession, and that he has acquired such possession legitimately. There is no right of lien over securities left in a bank by mistake, or over securities contained in a box the key of which is in the customer's possession.<sup>4</sup> Once actual possession is lost by the bank the right of lien passes off.<sup>5</sup> (2) The property over which the lien is sought to be exercised must not have been deposited with the banker for a special purpose inconsistent with the banker's right of lien. There is a presumption that securities deposited with a banker are subject to his lien, and the *onus* is upon the owner to prove the existence of a special agreement inconsistent with the right.<sup>3</sup> Thus, a bank agreed to continue credit to a firm under a cash credit bond executed by the firm and the partners, under which the bank was entitled at any time to place to the debit of the cash account any sum

<sup>1</sup> *Crerar v. Bank of Scotland*, 1921 S.C. 736.      <sup>2</sup> Bell, Com. ii. 115.

<sup>3</sup> *Robertson's Tr. v. Royal Bank of Scotland*, 1890, 18 R. 12.

<sup>4</sup> *Leese v. Martin*, 1873, L.R. 17 Eq. 224; *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 787.

<sup>5</sup> *Lloyds Bank, Ltd. v. Swiss Bankverein*, 1913, 29 T.L.R. 219.

or debt owing by the firm to it. One of the partners deposited securities and the bank was held entitled, on the bankruptcy of the firm, to retain the securities in satisfaction of sums due under another banking account of the firm for bills discounted.<sup>1</sup> But if the securities are deposited for safe custody only, or for some special purpose, they are not subject to the right of lien. A banker would appear not to have a general lien over securities deposited to cover special advances.<sup>2</sup> If the title taken by the bank to the securities is *ex facie* absolute, then the bank may claim a right to adjustment of accounts in which it may set against the property every advance it has made at and subsequent to its acquisition.<sup>3</sup> (3) It is essential that possession of the property was obtained by the banker in the ordinary course of his business *qua* banker. (4) It is essential to give a right of lien that the customer is indebted to the bank. In estimating whether the customer is indebted to the bank all banking accounts in his own name or for his own behoof are balanced. The separate accounts being merely for convenience of bookkeeping and the question being one of compensation, the banker is entitled to treat all the accounts as one and apply securities held in payment of the balance. The banker's lien over a credit balance does not operate for debts which are pending although not already due, unless the customer is bankrupt or *vergens ad inopiam*.<sup>4</sup>

#### SUBSECTION (3).—*Bills*.

148. A banker has a general lien over all bills lodged by his customer for collection if they are not specifically appropriated, but if bills have been specifically appropriated or are endorsed to him for the special purpose of negotiation he has no right of lien over them. The bill, to be liable to the banker's lien, must be in reality the property of the debtor; where the acceptor of a bill on the advice of the drawer presented a bill to the bank for discount it was held that the bank had no lien over it for debts due by the acceptor.<sup>5</sup> The right of lien extends over all bills belonging to the customer in possession of the banker *qua* banker, but does not extend to bills deposited for safe custody nor to bills left with the banker to be discounted which the banker refused to discount,<sup>6</sup> for until the bills are discounted they are a mere deposit at the bank. When the banker does discount them he becomes owner and is entitled to sue on them. Bills remitted to a banker for a special purpose which has not been fulfilled remain the property of the remitter and are subject to the banker's right of lien.<sup>7</sup>

<sup>1</sup> *Alston's Tr. v. Royal Bank of Scotland*, 1893, 20 R. 887.

<sup>2</sup> *Ibid.*, per Lord Low at p. 891; *Robertson's Tr. v. Royal Bank of Scotland*, 1890, 18 R. 12, per Lord President and Lord M'Laren; *National Bank of Scotland v. Dickie's Tr.*, 1895, 22 R. 740, per Lord Kyllachy at p. 748.

<sup>3</sup> *National Bank*, *supra*, per Lord M'Laren at p. 753.

<sup>4</sup> *Paul and Thain v. Royal Bank*, 1869, 7 M. 361; *Ireland v. North of Scotland Bank*, 1880, 8 R. 215.

<sup>5</sup> *Haig v. Buchanan*, 1823, 2 S. 412.

<sup>6</sup> *Borthwick v. Bremner*, 1833, 12 S. 121.

<sup>7</sup> *Glen v. National Bank*, 1849, 12 D. 353.

SUBSECTION (4).—*Negotiable Securities.*

149. The lien extends over all negotiable securities which have been lodged by the customer with the banker for the purpose of collecting the proceeds and crediting the customer's account therewith and against which the banker has made advances, and includes promissory notes, bills of exchange payable to bearer or endorsed in blank, cheques, coupons of bearer bonds, and the like ; but it does not extend to registered share certificates. Where, however, the share certificate is accompanied with a transfer in favour of the banker, he may refuse to retransfer the shares until the whole of his advances have been repaid ;<sup>1</sup> and this holds good even where the transfer is qualified by a back-letter declaring that the security is held for a particular debt.

It has not yet been decided whether securities belonging to individual partners and deposited with a banker to cover general balances are subject to the banker's lien in connection with the partnership account.

In Scotland the banker seems not to be entitled, apart from special agreement, to sell the subjects of his lien ; he has only a right of retention until his debt is paid.<sup>2</sup> If the security is in the shape of bills, he is bound to negotiate them timeously and to apply the proceeds in reduction of the amount due to him.<sup>3</sup>

SUBSECTION (5).—*Securities not the Property of the Customer.*

150. A person who takes a negotiable security for value and in good faith acquires a good title to it even where the person transferring it to him had no right to transfer it, and accordingly a banker may acquire a right of lien over securities which do not even belong to his customer.<sup>4</sup>

This type of case will arise most often in the case of stockbrokers depositing with a bank securities belonging to their clients. It may be, for example, that a buyer of bearer bonds does not wish to pay up the full purchase price, and he accordingly arranges that his stockbroker should get an advance to meet the price. The broker gets the advance from the bank by depositing the bonds, and unless a special contract is entered into, the result may be that the bonds are not only subject to the banker's lien for the particular advance, but may be subject to his lien for past and future advances made to the broker on his own behoof. The question in such cases is not, did the depositor have a title to pledge the securities in fortification of his own credit, but did the bank have any notice of want of such title in the depositor ? When a broker deposits securities with a bank as against advances, the bank is not put upon its inquiry to find out whether the securities really belong to the broker<sup>5</sup> or not—it is entitled to assume that they do. If, however,

<sup>1</sup> *Hamilton v. Western Bank*, 1856, 19 D. 152.

<sup>2</sup> *Robertson's Tr. v. Royal Bank of Scotland*, 1890, 18 R. 12, per Lord M'Laren at p. 20.

<sup>3</sup> *Bell, Com.* ii. 23.

<sup>4</sup> *Brandao v. Barnett*, 1846, 12 Cl. & Fin. 747.

<sup>5</sup> *National Bank v. Dickie's Tr.*, 1895, 22 R. 740.



the bank knows that the securities do not belong to the broker it is entitled to assume that the broker has the clients' authority to pledge them.<sup>1</sup> This holds even if the pledge is in security of a debt already due by the stockbroker,<sup>2</sup> or though the securities belonging to different clients are pledged *en bloc* for one advance.<sup>3</sup> The bank is not entitled to assume that the broker has authority to pledge them or make them subject to the banker's lien for advances made to the broker on his private account.<sup>4</sup> So too where a bill broker sent a bill to a bank to be discounted, accompanied by a letter which shewed clearly that he was acting for a principal, the bank was held not entitled to appropriate the proceeds to meet debts on the broker's own account.<sup>5</sup> But where a stockbroker sold shares for clients, received the buyers' cheque, and paid it into his own overdrawn account, the bank, though aware that the money came from a transaction on behalf of clients, was held entitled to assume that the broker had his clients' authority to deal with it as he had done.<sup>6</sup> And when a stockbroker pledged securities for a definite advance, and the bank had good reason for believing and did in point of fact believe that the securities did not belong to the broker, it was held that the broker's client could demand redelivery from the bank on paying up the loan for which they had been impledged, and not for the broker's general balance, as the reversion belonged to the client.<sup>4</sup>

SUBSECTION (6).—*Where Customer has Separate Accounts.*

151. Where a customer has several accounts with one branch or different branches of the same bank the banker has a right, similar to his right of lien, to appropriate the credit balance of one account to meet a debit balance upon another. Provided no question arises as to one or more of the accounts being trust accounts, the right of the banker so to appropriate is undoubted and is more of the nature of compensation or set off than real lien; the separate accounts are kept as a mere matter of convenience for bookkeeping. But although the banker may so act, the customer is entitled to some notice of his intention,<sup>7</sup> for so long as there is a credit balance on one account the customer is entitled to rely on cheques drawn on that account being honoured. If the banker fail to honour such a cheque without giving notice he will be liable in damages to his client. Only cheques drawn after notice may be dishonoured in safety.<sup>8</sup> The Lord President said: "I hold the established law to be that there is a contract between the bankers and their customers that the bankers shall honour cheques duly issued during the currency of

<sup>1</sup> *London Joint Stock Bank v. Simmons*, [1892] A.C. 201.

<sup>2</sup> *Forbes v. Pearson*, 1835, 1 C.M. & R. 849; *London Joint Stock Bank v. Simmons*, *supra*.

<sup>3</sup> *London Joint Stock Bank*, *supra*.      <sup>4</sup> *National Bank v. Dickie's Tr.*, 1895, 22 R. 740.

<sup>5</sup> *Farrer and Routh v. North British Banking Co.*, 1850, 12 D. 1190.

<sup>6</sup> *Thomson v. Clydesdale Bank*, 1891, 18 R. 951; aff. 20 R. (H.L.) 59.

<sup>7</sup> *Kirkwood & Son v. Clydesdale Bank*, 1908 S.C. 20.

<sup>8</sup> *King v. British Linen Co.*, 1899, 1 F. 928.



that relation and that, if they fail to do so, they are liable in damages for injury to credit."

**152.** Where an account kept by a customer is kept not for his own behalf but in a representative capacity, the question whether a bank is entitled to set off one balance against another depends on whether the bank has had notice of the representative nature of the account. If the bank had notice, then compensation between the accounts is not possible. But a banker is not bound to inquire closely as to whether money deposited with him is deposited for his customer personally or in a representative capacity only; <sup>1</sup> if the payments are not specifically earmarked he is entitled to treat them as belonging to the customer. In one case, <sup>2</sup> a customer kept three accounts, one of which he told his banker would consist of clients' money. Subsequently he reduced his accounts to two, incorporating the "clients" account with one of the others. In his bankruptcy the bank was held entitled to set off a credit on the incorporated accounts against a debit on his private accounts and not bound to inquire the amount of clients' money contained in the balance. It has been held that when the representative account is in name of the customer as executor for a late customer of the bank, the bank, on the theory that the executor and the defunct are the same, may set off a credit balance on the executry account against an overdraft which the deceased had at his death. <sup>3</sup>

#### SUBSECTION (7).—*Lien over Stock.*

**153.** By the charter of incorporation or articles of association of most banks the bank has a lien over its stocks or shares held by customers in respect of advances made to them, and this extends to stock held in a representative capacity, provided the bank had no notice of the existence of any trust. <sup>4</sup> This right does not exist at common law and is dependent on the charter of incorporation or articles of association.

#### SECTION 15.—OVERDRAFTS.

**154.** A banker is under no legal obligation to allow his customer to overdraw his account either with or without security; should he allow a customer to overdraw, he may stop doing so at any time, and the customer is not entitled to rely on the fact that the banker was in the habit of allowing him to overdraw his account to a certain extent. The banker may at any moment, on giving reasonable notice, call upon the customer to make provision for any overdraft he may have. <sup>5</sup> Even where the overdraft is being made against security deposited, the banker is under no obligation to allow the account to be overdrawn to an amount

<sup>1</sup> *Dunlop's Trs. v. Clydesdale Bank*, 1893, 20 R. (H.L.) 59.

<sup>2</sup> *Teale v. Brown & Co.*, 1894, 11 T.L.R. 56.

<sup>3</sup> *Mitchell v. Mackersy*, 1905, 8 F. 198.

<sup>4</sup> *Burns v. Lawrie's Trs.*, 1840, 2 D. 1348.

<sup>5</sup> *Ritchie v. Clydesdale Bank*, 1886, 13 R. 866.

equal to the amount of the security. But if in breach of an habitual custom the banker, without notice, refuses to honour a cheque drawn against security on which overdraft has been allowed in the past, he will be liable in damages to his customer.<sup>1</sup>

#### SECTION 16.—CUSTOMER'S RIGHT TO SECRECY.

**155.** A banker is bound not to disclose the state of his customer's account, or the purpose for which cheques are drawn.<sup>2</sup> It is thought that this may be limited to the extent that a banker must not by disclosing the state of his customer's account, except perhaps where he himself is concerned and the party requiring information is entitled to true information, cause his customer prejudice, otherwise he will be liable in damages. A banker is not bound, even under the Finance Acts, to declare to anyone the state of a customer's account.

#### SECTION 17.—LIABILITY OF BANK FOR REPRESENTATIONS AS TO CUSTOMER'S CREDIT.

**156.** It may often happen that a banker may be asked in the course of business as to the financial stability of his customer. He is not bound to answer such questions, but if he does he has the general duty of common honesty. In other words, in order to render him liable on the information which he gives he must be guilty of fraud as defined in *Derry v. Peek*.<sup>3</sup> There is no duty to be careful, but he will be liable in damages for statements made recklessly and without knowledge of the actual facts if the information subsequently turn out to be untrue and it has been acted upon. A banker is not bound to answer inquiries as to the solvency of a customer; it is enough if he give a correct version of the information contained in his own books. A banker will generally refuse to give information which may prejudice his customer unless he has ample grounds for believing it. To make him liable in damages on the ground that his statement amounts to a guarantee or a warranty, his statement must be in writing and subscribed by him or by his express authority.<sup>4</sup> Confidential reports made by a banker are personal to the person to whom they are made and will not found an action of damages at the instance of a third party relying on them.<sup>5</sup>

#### SECTION 18.—BANKER'S BOOKS AS EVIDENCE.

**157.** By the Bankers' Books Evidence Act, 1879,<sup>6</sup> it is provided that a sworn copy of entries in a banker's book may be used in evidence as

<sup>1</sup> *Forman v. Bank of England*, 1902, 18 T.L.R. 339.

<sup>2</sup> *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461.

<sup>3</sup> 1889, L.R., 14 A.C. 337; *Robinson v. National Bank*, 1916 S.C. (H.L.) 154.

<sup>4</sup> Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60), s. 6.

<sup>5</sup> *Salton & Co. v. Clydesdale Bank*, 1898, 1 F. 110.

<sup>6</sup> 42 Vict. c. 11.

if the actual book had been produced. Before any such entry can be received it is necessary to prove by a partner or officer of the bank or by sworn affidavit that at the time the entry was made the book was one of the ordinary books of the bank, and that the entry was made in the ordinary course of the bank business in a book which is still in the custody and control of the bank. The Court may go behind the mere heading of the account where the account is in reality that of another person.<sup>1</sup>

**158.** Where the bank is not a party to the cause, production of its books cannot be obtained except on special cause shewn to the judge. If the judge is satisfied that a reasonable case has been made out he makes an order permitting the party asking it to examine and make copies of entries in the banker's books. This order should be intimated to the bank three days before the date upon which the examination is to take place. If the bank be a party to the litigation it is in the same position as any other litigant and its books may be called for.

#### SECTION 19.—BANK AGENT.

##### SUBSECTION (1).—*Liability of Bank for Actings.*

**159.** A bank agent is in the same position as any other mercantile agent. In order to bind the bank by his actings he must act within the scope of his authority, and provided he does so the bank is responsible for his actings, if they result in loss through fault or negligence, even where no express direction from or knowledge by the bank is proved.<sup>2</sup> This liability rests on the ordinary principle that where one person holds out another as his agent and delegates to him certain authority, then if the agent confine his actings to the scope of his authority they are binding upon his principal, and anyone injured or aggrieved by them has an action against the principal as if he had performed the acts complained of.<sup>3</sup>

**160.** It is, however, essential in order to bind the bank that the agent act strictly within the scope of his authority, and if he personally give information as to the credit of a customer which turns out to be incorrect and which causes loss to the person to whom the information was supplied, authority will not be implied to bind the bank by representations which would involve the bank in damages.<sup>4</sup> The agent may be acting within the scope of his authority in making such representations, but as he cannot enter into guarantees which are to be binding on his principal without special authority, no action for damages will be against the bank. But if the information is not such as to amount to a guarantee, and is made truthfully, then the bank is bound by its agent. If a person be induced to undertake a guarantee or cautionary

<sup>1</sup> *South Staffordshire Tramway Co. v. Ebbsmith*, [1895] 2 Q.B. 669.

<sup>2</sup> *Barwick v. English Joint Stock Bank*, 1867, L.R. 2 Ex. 259.

<sup>3</sup> Bell, Com. i. 514.

<sup>4</sup> *Salton v. Clydesdale Bank*, 1898, 1 F. 110 ; *Hockey v. Clydesdale Bank*, 1898, 1 F. 119.



obligation on representations of a bank agent which turn out to be false he is entitled to be relieved from his bond.<sup>1</sup> It has been considered doubtful whether representations made by a bank agent even with the direct authority of the manager or directors would involve the bank as a co-partnership in a warranty, since such representations are not within the objects for which the bank was instituted, or for the conduct of which the shareholders delegated authority to their manager or directors.<sup>2</sup> In any event representations made by an agent, if they are to involve the bank in liability as guarantors, must be in writing and must be subscribed by or with the express authority of the bank,<sup>3</sup> so that the bank as principal is expressly made aware of its agent's proposed actings and can refuse to be drawn into the guarantee by refusing to sign the representations. It would seem, too, that a bank would escape liability on the ground that any representations made by its agent are personal to the person to whom they are made and do not confer rights upon third parties, and also that they only applied to the time at which they were made and not to advances made some months afterwards.<sup>4</sup>

**161.** The bank agent, especially in country towns, is very often a solicitor practising on his own account. If, in his capacity as solicitor, he receives money which he ought to have lodged in the bank but which he appropriates to his own use, even if there are entries made in the bank passbook, initialed by the agent, tending to shew that the money had been lodged, the bank is not necessarily bound by these entries on the agent becoming bankrupt or absconding. The persons making the claim must prove that the payments were received by the bank, and this can only be determined by a consideration of the whole facts of the case.<sup>5</sup> Had the entries been made in the banker's own books the case might have been different.

**162.** Banks are now entitled to embark in so many varieties of business that difficult questions may arise as to whether their agent had authority to bind them. The bank will be liable if it is made aware and approves of what the agent is doing even if the acting is rather outside the ordinary usage of bankers, and the bank will be bound by all acts which the agent may do within the scope of the delegated authority. See AGENCY.

#### SUBSECTION (2).—*Responsibility for Advice.*

**163.** While it is not part of the ordinary business of a banker to give advice to customers as to investments generally, there may be occasions when advice may be given by a banker as such and in the course of his business. In such circumstances, if he undertakes to advise,

<sup>1</sup> *Hamilton v. Watson*, 1843, 5 D. 280; aff. 1845, 4 Bell's App. 67; *Young v. Clydesdale Bank*, 1889, 17 R. 231; and *Royal Bank v. Greenshields*, 1914 S.C. 259.

<sup>2</sup> *Hockey v. Clydesdale Bank*, 1898, 1 F. 119, per Lord Young at pp. 125-6.

<sup>3</sup> Mercantile Law (Amendment) Act, 1856, s. 6.

<sup>4</sup> *Salton & Co. v. Clydesdale Bank*, 1898, 1 F. 110.

<sup>5</sup> *Couper's Tr. v. National Bank*, 1889, 16 R. 412.



he must exercise reasonable care and skill in giving the advice. He is under no obligation to advise, but if he undertakes to do so he will be liable if he does so negligently. If the banker had a pecuniary interest in the concern about which the customer seeks advice in regard to investing therein, the banker would be bound to make a full disclosure of the circumstance. Again, the banker might be in possession of information about the investment obtained in confidence from other customers which he was not at liberty to disclose, and in that case it might be his duty to refuse to advise because he could not speak freely on a material part of the transaction. Nor does it matter that the advice given was gratuitously given; there is no difference in law between the case of advice given by a doctor and advice given by a solicitor or banker in the course of his business.<sup>1</sup>

### SUBSECTION (3).—*Cautioners for Bank Agents.*

**164.** Banks sometimes require cautioners for their agents. This is not an invariable practice, but it is a usual one. Where it is done it is necessary for the bank to exercise the greatest possible care at the entering into the contract. It must disclose all relevant facts to the prospective cautioner which would lead to the inference that the party whose conduct is guaranteed is unworthy of credit, for example, any defalcations or irregularities of which he has been formerly guilty, and unless the utmost good faith has been observed the cautioners will not be liable.<sup>2</sup> Where the bank is not bound in the bond of caution to supervise its agent the cautioner will not be absolved from liability by reason only that the bank has been negligent: to free him it will be necessary for him to shew that the bank has in some way assisted, or at least connived at, the agent's irregularities. This may be inferred from facts and circumstances. In one case<sup>3</sup> the agent was addicted to drink to such an extent as to render him unfitted for his duties. This was known to the bank, which nevertheless continued him in its employment, and no notice was given to the cautioners. Loss resulted, traceable directly to the agent's habits, and the cautioners were absolved from liability.

**165.** If the obligation of the cautioner is to make good overdrafts made by the agent to customers without the bank's consent, and the agent, with the knowledge of the bank, overdraws his own account, the cautioner is not liable, as the overdraft is treated as an advance made by the bank to the agent and not as an overdraft made to a customer by the agent on the bank's behalf.<sup>4</sup> Had the advances been made without the knowledge of the bank they would have amounted to embezzlement, and the cautioner would have been liable.

<sup>1</sup> *Banbury v. Bank of Montreal*, [1918] A.C. at pp. 654 and 657.

<sup>2</sup> *Smith v. Bank of Scotland*, 1813, 1 Dow 272, per Lord Eldon at p. 294; 1829, 7 S. 244; *French v. Cameron*, 1893, 20 R. 966; *Bank of Scotland v. Morrison*, 1911 S.C. 593.

<sup>3</sup> *Tain v. County Bank*, 1895, 11 S.L. Rev. 322.

<sup>4</sup> *North of Scotland Bank v. Fleming*, 1882, 10 R. 217.

## SECTION 20.—LETTERS OF GUARANTEE.

SUBSECTION (1).—*Nature and Requisites.*

166. A banker very often, to secure himself from loss and at the same time prevent the necessity of proceedings being taken against a customer whose account is overdrawn, accepts another person as guarantor or cautioner for the advances made to the customer. The guarantee, which must be in writing,<sup>1</sup> may be for advances already made, or it may be for future advances; it may be for a limited sum, or it may be for any balance that may ultimately be owing by the customer; and it may be limited or unlimited in point of time.

The guarantee does not require to be holograph or tested; it is sufficient that it is in writing and signed by the guarantor, and that the person to whom the obligation is undertaken is indicated with reasonable certainty.<sup>2</sup>

167. Although the Mercantile Law Amendment Act applies only to documents *in re mercatoria*, it would seem that a guarantee to a bank, fulfilling the requisites of that statute, certainly if it were acted on,<sup>3</sup> would be binding; whether the same would apply to a document purporting to be a guarantee for past advances, and upon which *rei interventus* could not follow, except in the limited sense of the bank holding its hand against the customer, is still a matter of some doubt, and it is safer in all such cases to have the document tested or holograph.<sup>4</sup> It is not necessary to bring knowledge of the advances home to the cautioner to make an improbativ writing into a valid guarantee; it is sufficient that the improbativ writing exist in the bank's possession and that the bank on the faith of it have advanced money. The cautioner who signs the guarantee is presumed to have signed it and allowed it to be delivered, and the fact that in consideration therefor the banker makes the advance, is performance by the banker sufficient to bar the cautioner from rescinding or resiling to the banker's prejudice.<sup>5</sup>

168. Guarantees are sometimes made out on printed forms, the blanks being filled in and the deed thereafter tested. Occasionally it may happen that the cautioner himself fills in the blanks and merely signs the deed. The question will then arise: Is the document holograph of the granter to the extent that it is binding on him even if *rei interventus* have not taken place? The rule appears to be the same as that of printed wills. If the written words taken by themselves reasonably indicate a sensible intention on the part of the granter the document is binding on him.<sup>6</sup> The addition of the words "adopted as holograph" by the granter above his signature will remove all difficulty.<sup>7</sup>

<sup>1</sup> Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 60), s. 6.

<sup>2</sup> *Clapperton, Paton & Co. v. Anderson*, 1881, 8 R. 1004.

<sup>3</sup> *Church of England Life Assurance Co. v. Wink*, 1857, 19 D. 1079.

<sup>4</sup> *National Bank of Scotland v. Campbell*, 1892, 19 R. 885, per Lord McLaren; *Snaddon v. London, Edinburgh, and Glasgow Assurance Co.*, 1902, 5 F. 182, per Lord Kyllachy.

<sup>5</sup> *National Bank*, *supra*.

<sup>6</sup> *Stair*, iv. 42, 6; *Bell, Prin.*, s. 20.

<sup>7</sup> *Gavine's Tr. v. Lee*, 1883, 10 R. 448.

SUBSECTION (2).—*Duty of Bank to Guarantor.*

169. The granter of a bond of caution or guarantee is required to satisfy himself as to the state of affairs existing between the banker and the customer, and there is no obligation on the banker to make any disclosure whatever. Nor need a banker explain the exact legal effect of the document which the cautioner signs; he ought to read it for himself, and if the banker is silent and the cautioner fails to read and understand the document he cannot afterwards reduce the deed on the ground that it was not explained to him.<sup>1</sup> As Lord Shand said in the case noted: "Nothing is better settled than this, that a bank agent is entitled to assume that the customer has informed himself on the various matters material to the obligation he is about to undertake. The agent is not bound to volunteer any information or statement as to accounts, though if information is asked he is bound to give it and to give it truthfully." It will be seen that the obligation on the banker in connection with mercantile guarantees is far less heavy than that imposed upon him when the matter is one of a cautioner for one of his own agents. A cautioner for a bank agent is entitled to the fullest of information from the bank. The banker need not, in a question with a mercantile guarantee, inform the intending guarantor that the customer's account has already been guaranteed, but that the guarantee has been withdrawn. The guarantor, however, is entitled to have all the questions he asks honestly and truthfully answered, and he will be freed from the obligation he has undertaken if in return to his questions answers are given which are either untrue or intentionally misleading, or facts material to the risk are withheld from him.<sup>2</sup>

SUBSECTION (3).—*Interpretation of Guarantee.*

170. A guarantee will be interpreted strictly, and nothing will be held to be implied in it which is not clearly expressed.<sup>3</sup> Any limitations stated in the guarantee either as regards time or amount will be given effect to. Once it is reduced to writing it is incompetent to modify its terms by extraneous evidence.<sup>4</sup>

171. Whether a guarantee for future advances is a continuing guarantee or a guarantee for a given sum is a question of the construction of the document, *e.g.* it may well be that a guarantor contemplates that the customer may require £3000 by instalments from the bank, and he enters into a guarantee limited in amount to £3000. Assume that £3000 is advanced and is then repaid and a further £2000 advanced, is the guarantor liable for the £2000 or was his liability restricted to the first £3000, and was he absolved by the repayment of that amount; or again, of the first £3000 advanced £1000 is repaid

<sup>1</sup> *Young v. Clydesdale Bank*, 1889, 17 R. 231.

<sup>2</sup> *British Guarantee Association v. Western Bank*, 1853, 15 D. 834.

<sup>3</sup> *Rennie v. Smith's Trs.*, 1866, 4 M. 669.

<sup>4</sup> *Nicolsons v. Burt*, 1882, 10 R. 121.



and £2000 more advanced, is the guarantor liable for £2000 or £3000? These and all such questions must depend on a scrutiny of the particular bond of guarantee, but if the cautioner intends to limit his surety to a single dealing he should be careful to say so in his guarantee.<sup>1</sup>

172. Again, questions may arise as to the extent of the obligation undertaken by the cautioner. "If a person guarantees a limited portion of a debt, all the authorities shew that, if he pays that portion, he has in respect of it all the rights of a creditor. The question is whether the guarantor means 'I will be liable for £250 of the amount which A. B. shall owe you,' or 'I will be liable for the amount which A. B. shall owe you subject to this limitation, that I shall not be called upon to pay more than £250.'" <sup>2</sup> So, in a case where the granters of a cash credit bond bound themselves jointly and severally for A. to the extent of £1500, and to repay "the foresaid sum of £1500 of principal," and in general to refund whatever loss "not exceeding the said sum of £1500 of principal," the guarantee was held to be limited to repayment of an advance of £1500 to be made to A. by the bank, and as the bank had recovered (by the payment of 13s. 4d. in the £ from A.'s trustee) £1000 of this advance the guarantor was only held liable for repayment of the remaining £500. If the guarantor had paid the £1500 to the bank he would have been entitled in relief to an assignation of the bank's right to rank on A.'s estate for that sum.<sup>3</sup>

#### SUBSECTION (4).—*Revocation.*

173. A cautioner can revoke his guarantee although it is a continuing one, and although it has been acted on, at any time on making payment to the bank of any money that may be due under it. He may do so even if he has not been called upon to pay anything under the guarantee, and there is no contract between the debtor and the cautioner to leave the guarantee in force for a specified minimum time.<sup>4</sup> The mere fact that the surety has died may not revoke a guarantee; the fact of death must be brought home to the banker, and any advances made after the death and before notice has been received by the bank will be added to the cautioner's liability.<sup>5</sup> In some cases it may be that a guarantee is not revoked by the death of the guarantor but only after notice has been given by his executor that it is not intended to continue the guarantee.<sup>6</sup>

#### SUBSECTION (5).—*Rights of Guarantor on Payment.*

174. On payment of the amount of the guarantee the guarantor is entitled to have transferred to him any securities which the banker may

<sup>1</sup> Per Lord Ellenborough, *Merle v. Wells*, 1810, 2 Camp. 414.

<sup>2</sup> *Hobson v. Bass*, 1871, L.R. 6 Ch. 792 at p. 794.

<sup>3</sup> *Veitch v. National Bank of Scotland*, 1907 S.C. 554.

<sup>4</sup> *Doig v. Lawrie*, 1902, 5 F. 295.

<sup>5</sup> *Coulthart v. Clementson*, 1879, L.R. 5 Q.B.D. 42. <sup>6</sup> *Coulthart, supra*, p. 47.



hold as collateral,<sup>1</sup> unless these have been made subject to the banker's lien for other debts due by the debtor.

SUBSECTION (6).—*Discharge of Guarantor.*

175. The guarantor is discharged by payment of the debt by the debtor, and if the banker chooses to accept payment in a form which ultimately turns out to be unproductive and discharges the debtor, he cannot afterwards recover from the guarantor<sup>2</sup> on the footing that the debt has not been paid. When, however, the payment by the debtor was cut down as being a fraudulent preference, the creditor was entitled to recover against the guarantor,<sup>3</sup> because an innocent act unconsciously done does not discharge the surety. The creditor could not refuse the money, and he had no knowledge that the acceptance of it would injure the surety, and so he did no act injurious to the surety.

176. The guarantor will be discharged from his liability if the principal parties to the agreement, *i.e.* creditor and debtor, vary the terms of the contract without disclosing such variation to the cautioner. The rule may be stated thus. Where such variation is on the face of it quite unsubstantial, or is obviously in favour of the guarantor, the guarantor will not be discharged; but if the variation is not obviously unsubstantial, or cannot but be to the guarantor's prejudice, then the guarantor himself must be the sole judge whether or not he will consent to remain liable notwithstanding the variation. If he did not consent he is discharged.<sup>4</sup> Where a bank, without notice to the guarantors but with the consent of the debtor, increased the rate of interest to an extent declared illegal by statute, it was held that the increase of interest did not discharge the guarantors, but that they were liable for the principal sum advanced and for such interest as the debtor was legally liable to pay.<sup>5</sup>

177. If there are several co-guarantors who are liable jointly and severally, the release by the creditor of one or more will discharge the rest, but where the surety contracts severally, the creditor does not break that contract by releasing another several surety; the surety cannot therefore claim to be released on the ground of breach of contract.<sup>6</sup> As a guarantor is entitled to the benefit of any securities which the creditor may have as collateral security, whether when he became surety he knew of them or not, it follows that if, during the subsistence of the contract, the creditor deals with the securities in such a way as to diminish their value, the guarantor will be freed from liability to the extent of the value of that security.

<sup>1</sup> *Forbes v. Jackson*, 1882, 19 Ch. D. 615.

<sup>2</sup> *Lichfield Union Guardians v. Greene*, 1857, 1 H. & N. 884.

<sup>3</sup> *Petty v. Cooke*, 1871, L.R. 6 Q.B. 790.

<sup>4</sup> *Holme v. Brunskill*, 1877, L.R. 3 Q.B.D. 495.

<sup>5</sup> *Egbert v. National Crown Bank*, [1918] A.C. 903.

<sup>6</sup> *Ward v. National Bank of New Zealand*, 1883, L.R. 8 App. Ca. 764-5.

## SECTION 21.—GOODS LEFT FOR SAFE CUSTODY.

**178.** Bankers have frequently deposited with them for safe custody boxes containing plate, jewels, deeds, and securities of various kinds, the depositor retaining the key of the box in his possession. Where the banker acts gratuitously, he is not bound to more than ordinary care of the deposit entrusted to him; and the negligence for which alone he can be made liable is the want of that ordinary diligence which men of common prudence generally exercise about their own affairs.<sup>1</sup> While it is generally enough to repel the presumption of negligence in a gratuitous bailee that he has taken the same care of the thing deposited as of his own goods, the loss of his own property at the same time is no defence when it is proved that he has been guilty of negligence.<sup>2</sup> More care is required from the banker when he charges a commission.<sup>3</sup> The risk is with the owner when the thing perishes without fault. Property deposited with a banker must be returned to the person who deposited it, and the banker cannot take notice of the claims of other persons over that property.<sup>4</sup> The depositary cannot refuse redelivery on the ground that the subject of the deposit is not the property of the depositor.<sup>5</sup> But eviction of the true owner will be a good defence, and adverso claimants may by legal interpellation require him to retain.

## SECTION 22.—BANK HOLIDAYS.

**179.** The Bank Holiday Act, 1871,<sup>6</sup> provides that the following days shall be holidays in Scotland, viz. Christmas Day, New Year's Day, Good Friday, first Monday in May and August.

The Act provides that if New Year's Day or Christmas Day falls on a Sunday the Monday following shall be the holiday. All business which falls due on a holiday, such as paying of bills of exchange and protesting or noting of them, may be done on the day following such holiday. The fact that a cheque or bill of exchange is drawn on a holiday or a Sunday does not invalidate it.

<sup>1</sup> *Giblin v. McMullen*, 1869, L.R. 2 P.C. 317. (See article in *Journal of Institute of Bankers*, vol. xvii. p. 455, following case of *Langtry v. Union Bank of London* in 1896, confirming the view stated. The case was settled by judgment for the plaintiff for £10,000, and arose out of the delivery of certain valuables to an unauthorised person on a forged order.)

<sup>2</sup> Bell, Prin. 212.

<sup>3</sup> *In re United Service Co. (Johnston's Claim)*, 1870, L.R. 6 Ch. 212.

<sup>4</sup> *Leese v. Martin*, 1873, L.R. 17 Eq. 224.

<sup>5</sup> *Gelot v. Stewart*, 1871, 9 M. 957.

<sup>6</sup> 34 & 35 Vict. c. 17.



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## PART I.—INSOLVENCY.

## SECTION 1.—PRELIMINARY.

SUBSECTION (1).—*Nature and Evidence of Insolvency.*

180. Insolvency is the condition of inability to meet one's debts or obligations. Two tests of its existence may be taken : (1) Whether the debtor can meet his obligations, according to their terms, as they fall due ; (2) whether the value of his total assets at a particular time is equal to the sum of his liabilities.<sup>1</sup> In the former case the insolvency has been said to be *practical* insolvency ; in the latter, *absolute* insolvency. For most purposes the former test is that which falls to be applied. What creditors are primarily concerned with, particularly in commercial dealings, is to get fulfilment of their claims as they become prestable ; and if the debtor cannot so perform his obligations, but needs time to liquidate his affairs, he is giving his creditors less than their due, even although he may ultimately realise his estate so as to pay

GENERAL AUTHORITIES.—Bell, Com. ii. 152 *et seq.* ; Goudy on Bankruptcy, 4th ed., 15 *et seq.* ; Wallace on Bankruptcy, 2nd ed., 7 *et seq.* ; Murdoch on Bankruptcy, 5th ed., 1.

<sup>1</sup> Bell, Com. ii. 153 ; *M'Nab v. Clarke*, 1889, 16 R. 610 ; *Teenan's Trs. v. Teenan*, 1886, 13 R. 833 ; *Aitken v. Kyd*, 1890, 28 S.L.R. 115.



all his debts in full, with interest. An apparent sufficiency of assets, if and when realised, to meet all liabilities, is subject to the uncertainties of realisation ; and, in any case, the debtor has no right to demand a delay which may in many cases be ruinous or detrimental to creditors who have calculated on an exact fulfilment of their debts according to their terms.

**181.** Accordingly, it is quite settled that, in ascertaining the existence of insolvency in connection with its most important effect, viz. as an ingredient of notour bankruptcy, it is practical insolvency that has to be looked to.<sup>1</sup> Practical insolvency may be shewn, *inter alia*, (a) by dishonour of a past-due bill ; <sup>2</sup> (b) by instructions to apply for sequestration ; <sup>3</sup> (c) by calling a meeting of creditors ; <sup>4</sup> (d) by settling with creditors by a voluntary composition ; <sup>5</sup> or (e) by a public company stopping payment, and the directors calling a meeting of the partners to resolve to wind up.<sup>6</sup> The expiry of a charge without payment affords *prima facie* proof of insolvency in constituting notour bankruptcy.<sup>7</sup> On the other hand, it sometimes becomes necessary to ascertain retrospectively a man's financial state at a period when there had been no declared insolvency or failure to meet his current obligations. This often happens in the case of creditors challenging alienations or preferences granted by a debtor to their prejudice ; and in such cases it becomes necessary to resort to a general view of the debtor's financial affairs, so as to ascertain whether by the act challenged he was depleting a fund insufficient, or no more than sufficient, for meeting all his existing liabilities, or was giving away from a surplus of assets. The usual mode of proof is by examination of the debtor's books, etc., and striking a balance of assets and liabilities according to their fair value at the time. All competent evidence *pro ut de jure* may be adduced.<sup>8</sup>

#### SUBSECTION (2).—General Effects of Insolvency.

**182.** Insolvency has at common law and under statute certain effects on a debtor's power of dealing with his estate : (1) in restraining him from preferring particular creditors on what is *ex hypothesi* an insufficient fund for payment of all, and (2) in restraining him from depleting his estate, to the prejudice of his creditors, by alienating it for gratuitous or inadequate considerations. Apart from these effects, which will be found treated more particularly below, insolvency operates in various ways to qualify a man's relations with those towards whom

<sup>1</sup> *M'Nab v. Clarke, supra* ; *Teenan's Trs. v. Teenan, supra* ; *Aitken v. Kyd, supra*.

<sup>2</sup> Bell, Com. ii. 153.

<sup>3</sup> *Watt v. Findlay*, 1846, 8 D. 529.

<sup>4</sup> *Schuurmans & Sons v. Goldie*, 1828, 6 S. 1110 ; see *Mitchell v. City of Glasgow Bank*, 1878, 6 R. 439 ; 1879, 6 R. (H.L.) 60.

<sup>5</sup> *Hannan v. Henderson*, 1879, 7 R. 380.

<sup>6</sup> *Nelson Mitchell v. City of Glasgow Bank*, 1878, 6 R. 420 ; 1879, 6 R. (H.L.) 66.

<sup>7</sup> *M'Nab v. Clarke, supra* ; *Fleming v. Yeaman*, 1883, 21 S.L.R. 164 ; 1884, 9 App. Ca. 966 ; *Knowles v. Crooks*, 1865, 3 M. 457.

<sup>8</sup> Bell, Com. ii. 153 ; Goudy on Bankruptcy, 4th ed., 18.

he is under contractual obligations. Thus if a debtor in a debt not yet due be insolvent, or even if only in that suspect condition described as *vergens ad inopiam*, his creditor is entitled to the exceptional remedy of diligence in security, by way of arrestment, inhibition, or adjudication, or sequestration for rent.<sup>1</sup> And in the same circumstances it is probably competent for a creditor in a debt not yet due to raise action and obtain decree conditioned upon the arrival of the term of payment.<sup>2</sup> Similarly, in the case of mutual contract, if the obligations are not strictly reciprocal in point of time, the anterior obligation may be suspended if the party whose obligation is postponed is insolvent.<sup>3</sup>

183. Again, in the law of sale, the doctrine of stoppage *in transitu* recognises the right of a seller to stop the delivery of goods to an insolvent buyer while the goods are still in course of transit ;<sup>4</sup> and, on the other hand, it is the right and the duty of a buyer who has become insolvent to refuse to take delivery of goods sent him by the seller, to the effect of rescinding the contract, unless the seller should decline to rescind.<sup>5</sup> Under the Sale of Goods Act, 1893, which has codified the law of sale, a person is deemed insolvent within the meaning of the Act "who either has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of bankruptcy or not, and whether he has become a notour bankrupt or not." <sup>6</sup>

184. Insolvency does not, however, tie a debtor's hands so as to prevent him from entering into contracts. He may borrow money, become cautioner, and contract debts and incur obligations in the ordinary course of trade, and generally may perform all acts which a man may enter into "with a view to carry on affairs, and in the hopes of a better fortune." <sup>7</sup> But if the insolvency is notorious, and indicates a resolution on the part of the debtor *cedere foro*, it is a fraud for him to continue contracting ; and contracts entered into under such circumstances may be rescinded by those who are the victims of the fraud.<sup>8</sup> Insolvency does not *per se* bar the debtor from carrying on litigation, or, in the general case, subject him to the necessity of finding caution for expenses.<sup>9</sup> But caution is a matter entirely in the discretion of the Court, and in special circumstances of pronounced insolvency,

<sup>1</sup> Bell, Com. i. 7, 752-3 ; Bell, Prin. 46, 69, 832 ; Ersk. ii. 12, 42 ; iii. 6, 10 ; Juridical Styles, iii. 270 *et seq.*

<sup>2</sup> See *Crear v. Morrison*, 1882, 9 R. 890.

<sup>3</sup> Bell, Prin. s. 71.

<sup>4</sup> 56 & 57 Vict. c. 71, s. 44 ; Bell, Com. i. 223 *et seq.*

<sup>5</sup> 56 & 57 Vict. c. 71, s. 45 (4) ; Bell, Com. i. 253 ; Goudy on Bankruptcy, 4th ed., 280-1 ; Wallace on Bankruptcy, 2nd ed., 257.

<sup>6</sup> 56 & 57 Vict. c. 71, s. 62 (3).

<sup>7</sup> Bell, Com. i. 264-6 ; *Grant v. Grant*, 1748, Mor. 949 ; *Ehrenbacher & Co. v. Kennedy*, 1874, 1 R. 1131 ; Goudy on Bankruptcy, 4th ed., 20 ; Wallace on Bankruptcy, 2nd ed., 8.

<sup>8</sup> *Schuermans & Sons v. Goldie*, 1828, 6 S. 1110 ; *Watt v. Findlay*, 1846, 8 D. 529 ; see *Richmond v. Railton*, 1854, 16 D. 403 ; *Morton v. Abercromby & Co.*, 1858, 20 D. 362 ; *Ehrenbacher & Co. v. Kennedy*, *supra*.

<sup>9</sup> *Ritchie v. M'Intosh*, 1881, 8 R. 747 ; *Weir v. Buchanan*, 1876, 4 R. 8 ; *Bell v. Anderson*, 1862, 24 D. 603 ; *Lawrie v. Pearson*, 1888, 16 R. 62 ; *Johnstone v. Dryden*, 1890, 18 R. 191.

especially if combined with frivolous or vexatious litigation, the Court may require it to be found.<sup>1</sup>

SUBSECTION (3).—*Special Effects of Insolvency.*

**185.** The special effects of insolvency in restraining the debtor from granting alienations or preferences, to the prejudice of his creditors, will be treated under the following headings :—(1) Gratuitous Alienations at Common Law ; (2) Fraudulent Preferences at Common Law ; (3) Gratuitous Alienations under the Act 1621, c. 18 ; (4) Alienations in Defraud of Diligence under the Act 1621, c. 18.

SECTION 2.—GRATUITOUS ALIENATIONS AT COMMON LAW.

SUBSECTION (1).—*Alienations Challengeable.*

**186.** The general principle of this branch of the law is that from the moment a debtor becomes insolvent he is bound to regard himself as administering his estate for his creditors ; and, accordingly, while he may continue trading for the benefit both of his creditors and himself, he is not permitted to give away gratuitously the estate which it is his duty to make available to his creditors for payment of their debts.<sup>2</sup> Every form of gratuitous alienation, whether direct or indirect, and whether embodied in writing or consisting of a simple delivery of goods or money, is thus forbidden. Where, *e.g.*, an insolvent debtor, in knowledge of his insolvency, expended funds in improving a house held by his marriage-contract trustees for his wife and children, an action by the trustee in his sequestration was found relevant in which declarator was sought that, so far as the trust property was found to be benefited by the expenditure, the marriage trustees held it for behoof of the pursuer.<sup>3</sup> The challenge extends to alienations of every kind of right that can be made available by creditors.<sup>4</sup> The gratuitous alienation of a *spes successionis*—as by discharge of *legitim*—has been held to be reducible when granted by a bankrupt after sequestration ;<sup>5</sup> and the principle of the decision seems to strike at such an alienation when granted during the debtor's insolvency, before actual bankruptcy ; for, while a *spes successionis* is not attachable either by ordinary diligence or by sequestration, the debtor is not entitled by voluntary act to deprive his creditors of the chance of the succession becoming available for payment of their debts.

SUBSECTION (2).—*Constructive Fraud in the Alienation.*

**187.** *Animus fraudandi* on the part of the debtor is not required in order to vitiate the transaction challenged. A presumption of fraud

<sup>1</sup> Mackay, Manual, 154 ; *Ritchie v. M'Intosh*, *supra* ; *Stevenson v. Lee*, 1886, 13 R. 913.

<sup>2</sup> Bell, Com. ii. 170.

<sup>3</sup> *Main v. Fleming's Trs.*, 1881, 8 R. 880 ; see also *Dobie v. Mitchell*, 1854, 17 D. 97.

<sup>4</sup> Goudy on Bankruptcy, 4th ed., 23.

<sup>5</sup> *Obers v. Paton's Trs.*, 1897, 24 R. 719.



in the sense of breach of trust is created by the fact of gratuitous alienation during insolvency, and proof of actual intent to defraud is not required.<sup>1</sup> Nor does it seem to be necessary that he be in contemplation of bankruptcy, or conscious that his failure is imminent.<sup>2</sup> The injury to the creditors is equally great whether the debtor knows of his insolvent state or not. The point, however, is not clearly settled. Fraud on the part of the recipient of the gift is not required.<sup>3</sup>

SUBSECTION (3).—*Onus of Proof of Non-onerosity.*

188. The onus of proving a particular transaction to have been gratuitous lies on the person challenging it, there being no such presumption at common law, as under the Act 1621, c. 18. The terms of the deed constituting the grant are not conclusive, and may be contradicted by parole evidence.<sup>4</sup>

SUBSECTION (4).—*Onerous Consideration.*

(i) *Money or Money's Worth.*

189. Where value in money, or money's worth, is given, the transaction cannot be impeached, but the value given must amount to a fair equivalent in order to support the transaction, otherwise it will be reducible *quoad excessum*.<sup>5</sup>

(ii) *Prior Legal Obligation.*

190. Prior legal obligations, including just and lawful debts due by the granter, form, in point of quality, good consideration to elide the charge of non-onerosity.<sup>6</sup> The granting of security or satisfaction (other than specific performance) to a prior creditor may be challengeable as a fraudulent preference.<sup>7</sup>

(iii) *Antenuptial Marriage Contract Provisions.*

191. Consideration or value arising out of the provisions of mutual contracts may or may not be adequate to elide a challenge, according to the circumstances of the particular case.<sup>8</sup> The cases under this head have mainly related to settlements by marriage contract. In the case

<sup>1</sup> Bell, Com. ii. 184; *Main v. Fleming's Trs.*, *supra*; Goudy on Bankruptcy, 4th ed., 23-24.

<sup>2</sup> Goudy on Bankruptcy, 4th ed., 24; *Wilson v. Drummond's Reps.*, 1853, 16 D. 275; cp. *Edmond v. Grant*, 1853, 15 D. 703.

<sup>3</sup> *M'Cowan v. Wright*, 1853, 15 D. 494; Goudy on Bankruptcy, 4th ed., 24.

<sup>4</sup> Bell, Com. ii. 184; see *Morrison v. Carron Co.*, 1854, 16 D. 1125; *Forsyth v. Duncan*, 1863, 1 M. 1054.

<sup>5</sup> *Glencairn v. Birsbane*, 1677, Mor. 1011; see *Watson v. Grant's Trs.*, 1874, 1 R. 882.

<sup>6</sup> *Broudfoot v. Leith Banking Co.*, 9th Dec. 1808, F.C.; *Horne v. Hay*, 1847, 9 D. 651; *M'Cowan v. Wright*, 1853, 15 D. 494; *Taylor v. Jones*, 1888, 15 R. 328.

<sup>7</sup> See under Fraudulent Preferences at Common Law, para. 203, *infra*; see also Act 1696, c. 5, under Notour Bankruptcy, para. 239, *infra*.

<sup>8</sup> Bell, Com. ii. 176.



of an *antenuptial* marriage contract entered into while the husband is insolvent, the general result of the authorities seems to be that a provision made by him for his wife will be sustained to the extent of a reasonable provision. Thus Professor Bell says: "Even in antenuptial contracts, if the husband is at the time insolvent, the provision to the wife will not be sustained beyond the limits of a reasonable and moderate allowance."<sup>1</sup> In estimating the reasonableness of the settlement, it has been said that the Court will not "measure the rationality of the provisions in nice scales: a case of gross excess must be made out to justify reduction."<sup>2</sup> In the case of *M'Lachlan v. Campbell* the Court expressed the opinion that "the station of the wife and the fortune she brought should be chiefly kept in view rather than the private circumstances of the husband."<sup>3</sup> In the case of *M'Lay v. M'Queen* the competency of a partial reduction of an antenuptial marriage contract was doubted.<sup>4</sup> Collusion between the spouses may introduce a different element, as shewing that the provisions were not truly the consideration for the marriage.<sup>5</sup> The validity of provisions to the children of the marriage depends on the same principle as those to the wife; and, accordingly, they will be sustained so far as moderate and rational in character, and reducible *quoad excessum*.<sup>6</sup> The children's provisions, however, must be so expressed as to amount to a *jus crediti*, as distinguished from a mere right of succession.<sup>7</sup> Antenuptial provisions made by the insolvent parent of either of the spouses would seem to be also supported by the onerosity of the marriage, so far as reasonable, where the marriage takes place on the faith of them.<sup>8</sup> But knowledge by the spouses of the granter's insolvency may lay the provision open to challenge.<sup>9</sup> The onerosity of the marriage extends to provisions in favour of the more remote issue, as well as the immediate children, but not to provisions in favour of third parties.<sup>10</sup>

#### (iv) *Postnuptial Provisions.*

**192.** A postnuptial settlement differs from an antenuptial one in lacking the onerosity which arises when the marriage takes place on the faith of the settlement. Accordingly a non-remuneratory postnuptial provision by a husband to take effect *stante matrimonio* is in law a

<sup>1</sup> Bell, Com. i. 683; Goudy on Bankruptcy, 4th ed., 27; *Duncan v. Sloss*, 1785, Mor. 987; *M'Lachlan v. Campbell*, 1824, 3 S. 192; *Carphin v. Clapperton*, 1867, 5 M. 797; Wallace on Bankruptcy, 2nd ed., 9; cp. Fraser on Husband and Wife, ii. 1350.

<sup>2</sup> Lord Neaves in *Carphin v. Clapperton*, *supra*.

<sup>3</sup> *M'Lachlan v. Campbell*, *supra*; see also *Watson v. Grant's Trs.*, 1874, 1 R. 882.

<sup>4</sup> *M'Lay v. M'Queen*, 1899, 1 F. 804.

<sup>5</sup> *Watson v. Grant's Trs.*, *supra*, per Lord Ormidale.

<sup>6</sup> Goudy on Bankruptcy, 4th ed., 28; *Ballantyne v. Dunlop*, 17th Feb. 1814, F.C.; *Blackburn v. Oliver*, 29th May 1816, F.C.; *Watson v. Grant's Trs.*, *supra*.

<sup>7</sup> Goudy on Bankruptcy, 4th ed., 28; *M'Kinnon's Trs. v. Dunlop*, 1913 S.C. 232.

<sup>8</sup> *Thoirs' Creditors v. Middleton*, 1729, Mor. 984; *Cruikshank v. Cruikshank*, 1845, 4 Bell's App. 179; Goudy on Bankruptcy, 4th ed., 28-29; Wallace on Bankruptcy, 2nd ed., 9.

<sup>9</sup> *Wood v. Reid*, 1680, Mor. 977.

<sup>10</sup> *Hall's Trs. v. Macdonald*, 1892, 19 R. 567; 1893, 20 R. (H.L.) 88.

donation *inter virum et uxorem*, and, prior to the Married Women's Property (Scotland) Act, 1920, was reducible by his creditors, whether he was solvent or insolvent when he granted it.<sup>1</sup> A postnuptial settlement to take effect after the husband's death was in a different position, because there is a natural obligation on the husband to make reasonable provision for his wife's support after his death. Prior to the Act of 1920, it was not a clearly settled question whether such a settlement made during insolvency could compete with the husband's creditors,<sup>2</sup> and the question has not been settled since the Act.

**193.** The Married Women's Property (Scotland) Act, 1920,<sup>3</sup> s. 5, provides as follows:—"Donations *inter virum et uxorem* shall be irrevocable by the donors: Provided that (a) this enactment shall not take effect as regards donations made or granted before the passing of this Act until the expiry of one year from and after that date; (b) any donation completed within a year and day before the sequestration of the estates of the donor under the Bankruptcy (Scotland) Act, 1913, or any amending statute, shall be revocable at the instance of the creditors of such donor." The Act does not apply to any provision made in favour of or reserved by either spouse by antenuptial contract of marriage, whether dated before or after the passing of the Act. Such provisions are as valid and irrevocable in all respects as if the Act had not been passed.<sup>4</sup> The enactment contained in s. 5 applies to all estate situated in Scotland and by the law of Scotland heritable as between husband and wife, although the donor of such estate shall be domiciled furth of Scotland.<sup>5</sup>

The Act came into operation on 23rd December 1920. All donations, of whatever date, made by spouses who are domiciled in Scotland, and also donations of heritable estate in Scotland by spouses domiciled abroad, are now as irrevocable by the donors as if they had been made to third parties.

**194.** The following opinion has been expressed as to the effect of the Act: <sup>6</sup>—"So far as creditors are concerned, such donations (by spouses) are protected, provided they have been completed a year and day before the sequestration of the estates of the donor. Donations between spouses, like other gratuitous alienations, may of course be attacked by creditors if they are struck at by the Act 1621, c. 18.<sup>7</sup> The effect of the Act of 1920 is not to confer any special privileges on such donations, but merely after the lapse of a year and day to put them upon the same footing as other gratuitous gifts. The purpose of s. 6 is to make clear that onerous provisions contained in antenuptial

<sup>1</sup> *Dunlop's Trs. v. Dunlop*, 1865, 3 M. 758; 1867, 5 M. (H.L.) 22; *Miller v. Learmonth*, 1871, 10 M. 107; 1875, 2 R. (H.L.) 62; *Robertson's Trs. v. Robertson*, 1901, 3 F. 359.

<sup>2</sup> *Guthrie v. Cowan*, 1846, 9 D. 124; *Fraser on Husband and Wife*, ii. 1500; *Goudy on Bankruptcy*, 4th ed., 29-31; *McLaren on Wills*, 667-8; *Bell, Com. i.* 687; *Ersk. iv.* 1, 33; *M'Bain v. Robertson*, 1900, 8 S.L.T. 101 (Lord Kincairney).

<sup>3</sup> 10 & 11 Geo. V. c. 64.

<sup>4</sup> *Ibid.*, s. 6.

<sup>5</sup> *Ibid.*, s. 7 (2).

<sup>6</sup> *Walton on Husband and Wife*, 2nd ed., 127.

<sup>7</sup> See *Goudy on Bankruptcy*, 4th ed., 43.

contracts of marriage are not affected by the Act, and that accordingly the year and day has no application to them. Postnuptial provisions may now be protected against creditors although they take effect *stante matrimonio*. But a husband cannot now, any more than formerly, protect his own estate from his creditors by such devices as are found in the cases of *Miller v. Learmonth*,<sup>1</sup> *Elliott v. Purdom*,<sup>2</sup> and *Honeyman & Wilson v. Robertson*.<sup>3</sup> An obligation by a husband to pay his wife an annuity during the subsistence of the marriage, such as was considered in *Kemp v. Napier*,<sup>4</sup> would, it is thought, be still reducible by creditors as regards payments made within a year and day of sequestration, and also as regards future payments. On the other hand, a provision such as that made in *Dunlop v. Johnston*,<sup>5</sup> where the husband vested funds in trustees to pay the interest to his wife and family during the subsistence of the marriage, would now appear to be protected against creditors. Wherever the husband has put the fund outwith his own control it will be secure against his creditors after the lapse of a year and day."

195. Postnuptial provisions to children, granted during insolvency, give no right in competition with onerous creditors.<sup>6</sup>

#### (v) *Policies of Assurance.*

196. There is a special statutory provision applicable to postnuptial settlements in the case of policies of assurance. By the Married Women's Policies of Assurance (Scotland) Act, 1880, it is enacted that "a policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control, or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency . . . provided always that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person on whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof." <sup>7</sup>

<sup>1</sup> 1871, 10 M. 107.

<sup>2</sup> 1895, 22 R. (H.L.) 26.

<sup>3</sup> 1886, 14 R. 163.

<sup>4</sup> 1842, 4 D. 558.

<sup>5</sup> 1865, 3 M. 758; 5 M. (H.L.) 22.

<sup>6</sup> Ersk. iv. 1, 34; Bell, Com. i. 687-8; Fraser on Husband and Wife, ii. 1502; *Queensberry v. Mouswell*, 1677, Mor. 961.

<sup>7</sup> 43 & 44 Vict. c. 26, s. 2.



SUBSECTION (5).—*Insolvency of the Debtor.*

**197.** It is not necessary that the debtor shall have been insolvent before granting the alienation challenged ; it is sufficient if the effect of the alienation is to make him so.<sup>1</sup> The debtor must have continued insolvent down to the time when the transaction is challenged ; the vice in it will be cured if he has regained a solvent condition.<sup>2</sup>

**198.** In the general case, the onus of proving insolvency lies on the creditor challenging the transaction, there being no such presumption at common law as under the Act 1621, c. 18. As the insolvency has to be shewn retrospectively, the proof proceeds by a comparison of the debtor's total assets with his total liabilities at the date of the transaction.<sup>3</sup> "It has been held sufficient if the debtor have, at the time of the deed, a *visible* estate, although *ex eventu* he should prove insolvent. The subsequent depression of his funds, or the fall of markets for land or goods, will therefore afford a good answer on the question of insolvency, where, on a fair reckoning of the estate as at the date of the deed, the debtor was solvent."<sup>4</sup> The estimate of the debtor's affairs will be taken favourably to solvency when the challenge is at a distant time.<sup>5</sup>

The onus of proof may be shifted if the transaction be attended by circumstances laying it under suspicion, as where the connection between the parties has been very close and intimate,<sup>6</sup> or where the transaction is of a latent character.<sup>7</sup> And even where the alienation has been made during the granter's solvency, it has been held liable to challenge, if kept latent so as to deceive posterior creditors, especially where the receiver has had any participation in the design.<sup>8</sup>

SUBSECTION (6).—*Title to Challenge.*

**199.** Any onerous creditor, whether prior or posterior, may make the challenge.<sup>9</sup> In other respects the title to challenge is the same as under the Act 1621, c. 18.<sup>10</sup>

SUBSECTION (7).—*Form of Challenge.*

**200.** "Challenges at common law seem always to have been competent by way of exception as well as action."<sup>11</sup> The Bankruptcy Act, 1913,

<sup>1</sup> Goudy on Bankruptcy, 4th ed., 32 ; *M'Kenzie v. Fletcher*, 1712, Mor. 924 ; cp. Lord M'Laren in *M'Lay v. M'Queen*, 1899, 1 F. 804.

<sup>2</sup> Goudy on Bankruptcy, 4th ed., 32.

<sup>3</sup> Bell, Com. ii. 153, 180 ; *Street v. Mason*, 1672, Mor. 4911 ; *M'Kenzie v. Fletcher*, *supra*.

<sup>4</sup> Bell, Com. ii. 180 ; *M'Kell v. Jamieson*, 1680, Mor. 920.

<sup>5</sup> Bell, Com. ii. 181.

<sup>6</sup> *Ibid.*, 184.

<sup>7</sup> *Pollock's Crs. v. Pollock*, 1669, Mor. 4909 ; *Simpson v. Finlay*, 1697, Mor. 11570 ; *Burton on Bankruptcy*, i. 115.

<sup>8</sup> *Inglis v. Boswell*, 1676, Mor. 11567 ; *Street v. Mason*, *supra* ; *Pollock's Crs. v. Pollock*, *supra* ; *Blair v. Wilson*, 1677, Mor. 4927 ; *Roseberry v. Macqueen*, 1823, 2 S. 443 ; *Hodge v. Morrisons*, 1883, 21 S.L.R. 40.

<sup>9</sup> Ersk. iv. 1, 44 ; Goudy on Bankruptcy, 4th ed., 33.

<sup>10</sup> See *infra*, para. 235.

<sup>11</sup> Goudy on Bankruptcy, 4th ed., 34 ; *M'Ewen v. Doig*, 1828, 6 S. 889.



s. 8, provides as follows : “ Deeds made void by this Act, and all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law may be set aside either by way of action or exception, and a decree setting aside the deed by exception shall have the like effect, as to the party objecting to the deed, as if such decree were given in an action at his instance : and this section shall apply as well in the Sheriff Court as in the Court of Session.” “ Exception ” includes the case of a pursuer challenging by way of reply.<sup>1</sup> An action of reduction in the Sheriff Court is not competent,<sup>2</sup> and the ordinary jurisdiction of the Sheriff is not enlarged by the above provisions.<sup>3</sup>

**201.** Where the challenge is made by a direct action, it must be in the form of a reduction in the Court of Session if it involves the setting aside of any writing on which the alienation depends.<sup>4</sup> Otherwise the challenge may be by a petitory action (if the pursuer be one having a title to insist in a petitory claim, as, *e.g.*, a trustee in sequestration), or by an action of declarator, and in either case the action may be in the Court of Session or the Sheriff Court, an action of declarator being now competent in the Sheriff Court.<sup>5</sup> It is competent to combine with an action of reduction a conclusion directed against the bankrupt for payment of the pursuer's claim, and thus obtain, where necessary, a ground for doing diligence against the property when the alienation has been set aside.<sup>6</sup> The necessary averments of the action are : (1) that the alienation was made gratuitously ; (2) that the granter is insolvent and was so at the date of the alienation ; (3) that the alienation was made to the prejudice of lawful creditors. If all these averments are proved, intent to defraud is presumed.<sup>7</sup> As regards the effects of a successful challenge, reference may be made to what is said below on this head, in dealing with the Act 1621, c. 18.<sup>8</sup>

### SECTION 3.—FRAUDULENT PREFERENCES AT COMMON LAW.

**202.** The prohibition of transactions of this nature depends, not on their being gratuitous (the recipient being *ex hypothesi* a creditor), but on the fact that they disturb the equality among the creditors, whose rights are regarded as fixed, so far as the debtor is concerned, on the occurrence of his insolvency.<sup>9</sup>

<sup>1</sup> *Dickson v. Murray*, 1866, 4 M. 797, per L. P. Inglis.

<sup>2</sup> *Dickson v. Murray*, *supra* ; see *Moroney v. Muir*, 1867, 6 M. 7.

<sup>3</sup> *Dickson v. Murray*, *supra*.

<sup>4</sup> *Cook v. Sinclair*, 1896, 23 R. 925. For case of reducing title created by recipient of property, see *Dobie v. Mitchell*, 1854, 17 D. 97.

<sup>5</sup> Mackay's Manual, 391 ; *Main v. Fleming's Trs.*, 1881, 8 R. 880 ; Juridical Styles, iii. 79.

<sup>6</sup> Per Lord M'Laren in *Cook v. Sinclair*, *supra*.

<sup>7</sup> *Main v. Fleming's Trs.*, *supra* ; *Edmond v. Grant*, 1853, 15 D. 703 ; see *M'Cowan v. Wright*, 1852, 14 D. 901.

<sup>8</sup> Para. 228, *infra*.

<sup>9</sup> Bell, Com. i. 9 ; ii. 226.

SUBSECTION (1).—*Preferences Challengeable.*

**203.** Speaking generally, every kind of transaction by which a benefit is given to one creditor in preference to others, whether it be by direct transfer or by some indirect operation, is open to challenge.<sup>1</sup> Thus the rule applies where a security is given for what was formerly an unsecured debt, or an obligation to grant a security is undertaken;<sup>2</sup> or, again, where the debtor facilitates a creditor's attempt to execute diligence or obtain a decree.<sup>3</sup> But a mere voucher or acknowledgment of debt, such as an I.O.U., is not impeachable.<sup>4</sup> A trust deed for creditors providing for equality of treatment in distribution is not reducible at common law.<sup>5</sup> Where certain creditors of an insolvent assembled and, without either calling a general meeting or obtaining a disposition or any legal warrant, took possession of part of the stock and divided it among themselves in proportion to their debts, and agreed to contribute small sums towards enlarging the dividend arising out of the residue for the benefit of the other creditors, it was held, in a question with a creditor who was no party to this arrangement, that they must either restore to the estate the abstracted goods or their just value, or pay the creditor his debt in full.<sup>6</sup>

SUBSECTION (2).—*Nature of Fraud.*

**204.** *Animus fraudandi* on the part of the debtor is not required: fraud is presumed if the preference is granted voluntarily, while he is insolvent and conscious of his insolvency.<sup>7</sup> Collusion on the part of the creditor who receives the preference does not appear to be necessary. In the leading case of *M'Cowan v. Wright* the question was fully considered, and the doctrine was clearly laid down that knowledge of the debtor's insolvency on the part of the creditor is unnecessary, the *ratio* being that the presence or absence of such knowledge makes no difference in the injury done to the other creditors by the preference being granted.<sup>8</sup> Knowledge on the part of the preferred creditor

<sup>1</sup> Goudy on Bankruptcy, 4th ed., 36; as to exceptions, see *infra*.

<sup>2</sup> *M'Cowan v. Wright*, 1853, 15 D. 494; *Thomas v. Thomson*, 1866, 5 M. 198; *Wylie, etc. v. Jervis*, 1913, 1 S.L.T. 465.

<sup>3</sup> *M'Ewen & Miller v. Doig*, 1828, 6 S. 889; *Laurie's Tr. v. Beveridge*, 1867, 6 M. 85; *Wilson v. Drummond's Reps.*, 1853, 16 D. 275; *Ex parte Pearson In re Mortimer*, 1873, L.R. 8 Ch. App. 667.

<sup>4</sup> *Williamson v. Allan*, 1882, 9 R. 859; Goudy on Bankruptcy, 4th ed., 36-37; Wallace on Bankruptcy, 2nd ed., 11-12.

<sup>5</sup> Bell, Com. ii. 387-8.

<sup>6</sup> *Crawford v. Black*, 1829, 8 S. 158; see *Smart & Co. v. Stewart*, 1911 S.C. 668; 1910 S.C. 18; *Price & Pierce v. Bank of Scotland*, 1910 S.C. 1095; 1912 S.C. (H.L.) 19.

<sup>7</sup> *M'Cowan v. Wright*, 1852, 14 D. 968; 1853, 15 D. 494; *Wilson v. Drummond's Reps.*, *supra*; *M'Dougall's Tr. v. Ironside*, 1914 S.C. 186.

<sup>8</sup> *M'Cowan v. Wright*, 1852, 15 D. 494; see also *Wilson v. Drummond's Reps.*, 1853, *supra*; *Guild v. Orr Ewing & Co.*, 1857, 20 D. 3 and 392; *Adamson, Howie & Co. v. Guild*, 1867, 6 M. 347; cp. *Edmond v. Grant*, 1853, 15 D. 703; *Thomas v. Thomson*, 1866, 5 M. 198; *Laurie's Tr. v. Beveridge*, *supra*; Goudy on Bankruptcy, 4th ed., 38-39, where the opinion is expressed that the question is still unsettled; Wallace on Bankruptcy, 2nd ed., 12.

being, however, a relevant and important fact should, where it can be proved, be averred and founded on by the challenging creditor.<sup>1</sup>

SUBSECTION (3).—*Transactions Exempted from Challenge.*

(i) *Cash Payments.*

**205.** Payment in cash of a money debt presently due is not challengeable,<sup>2</sup> even though both the debtor and the creditor are aware of the debtor's insolvency;<sup>3</sup> but payment may be bad if anticipatory,<sup>4</sup> or as the result of a fraudulent contrivance between the debtor and creditor for conversion of the debtor's assets into cash, to enable payment to be made in that form.<sup>5</sup>

(ii) *Transactions in Course of Trade.*

**206.** The fulfilment of obligations otherwise than by payment of money is protected if done in the fair and ordinary course of trade.<sup>6</sup> See the corresponding exception under the Act 1696, c. 5.<sup>7</sup>

(iii) *Nova debita.*

**207.** Alienations in specific implement of obligations under onerous contracts, where the obligations *hinc inde* are undertaken *unico contextu*, are not subject to challenge, as, *e.g.*, delivery of goods under a contract of sale,<sup>8</sup> or a security for a loan specifically agreed to be given when the loan was granted.<sup>9</sup> But a transaction which is *ex facie* a *novum debitum* may be impeached if it be really a collusive contrivance to confer a preference, as where a sale to an existing creditor is made for the purpose of enabling him to plead his existing debt as a set-off against the price.<sup>10</sup>

(iv) *Preferences under Pressure of Legal Diligence.*

**208.** Only voluntary preferences are subject to challenge. Preferences granted under pressure of legal diligence are not fraudulent, provided the diligence be not simulate or collusive.<sup>11</sup>

<sup>1</sup> Goudy on Bankruptcy, 4th ed., 39.

<sup>2</sup> *Broadfoot v. Leith Banking Co.*, 9th Dec. 1808, F.C.; *Thomas v. Thomson*, 1865, 3 M. 358; *Coutts' Tr. v. Webster*, 1886, 13 R. 1112; see *Lamond v. Stewart & Bisset*, 1887, 15 R. 32; *Pringle's Tr. v. Wright*, 1903, 5 F. 522.

<sup>3</sup> *Coutts' Tr. v. Webster*, *supra*; *Thomas v. Thomson* (1865), *supra*; *Taylor v. Jones*, 1888, 15 R. 328, per Lord Rutherford Clark.

<sup>4</sup> *Speir v. Dunlop*, 1827, 5 S. 729; *Blinchow's Tr. v. Allan & Co.*, 1828, 7 S. 124; *affd.* 7 W. & S. 26; *Guild v. Orr Ewing & Co.*, *supra*; cp. *Stiven v. National Bank*, 1897, 34 S.L.R. 692.

<sup>5</sup> *Taylor v. Jones*, *supra*; *Lamond v. Stewart & Bisset*, *supra*.

<sup>6</sup> Bell, Com. ii. 228; *Thomas v. Thomson* (1866), *supra*.

<sup>7</sup> See paras. 277 *et seq.*, *infra*. <sup>8</sup> *Taylor v. Farrie*, 1855, 17 D. 639.

<sup>9</sup> *Miller's Tr. v. Shield*, 1862, 24 D. 821; *Horne v. Hay*, 1847, 9 D. 651; *Stiven v. Scott & Simson*, 1871, 9 M. 923; see *Rose v. Falconer*, 1868, 6 M. 960; *Clark v. West Calder Oil Co.*, 1882, 9 R. 1017.

<sup>10</sup> Bell, Com. ii. 124, 199; *Marshall's Tr. v. James Provan & Co.*, 1794, Mor. 1144.

<sup>11</sup> Goudy on Bankruptcy, 4th ed., 39.



SUBSECTION (4).—*Insolvency of the Debtor.*

**209.** The debtor must have been insolvent before granting, or have been reduced to insolvency by, the alienation challenged ; and he must have continued insolvent down to the date of the challenge.<sup>1</sup> Knowledge by the debtor of his insolvency at the time of the grant must be proved, but it will be inferred from slight evidence. Intention to abandon to creditors is not necessary.<sup>2</sup> See, as to proof of insolvency, under Gratuitous Alienations at Common Law.<sup>3</sup>

SUBSECTION (5).—*Title to Challenge, etc.*

**210.** It cannot be said to be definitely settled whether creditors in debts contracted after the alienation are entitled to challenge, or only those whose debts were contracted prior thereto ; but it is thought that any creditor who can instruct prejudice may impeach the transaction. In the leading case of *M'Cowan v. Wright* the issue was limited to prior creditors, but the question does not appear from the report to have been considered.<sup>4</sup> In the analogous case of challenges under the Act 1696, c. 5, the Court, prior to the Bankruptcy Act, 1856 (s. 11),<sup>5</sup> decided that the right of challenge was confined to prior creditors. Erskine, however, lays it down that "creditors whose debts are contracted after the alienation made by the debtor, though they have no aid from the statutes, are not excluded from the remedies competent to them by the common rules of law. They are, therefore, entitled to an action for setting aside every right granted by the debtor to their prejudice, though previously to their own grounds of debt, if it carry in it evident marks of fraud."<sup>6</sup> Bell also supports the right of posterior creditors to challenge.<sup>7</sup> In other respects, the title to challenge, and the form and effects thereof, are the same as under the Act 1696, c. 5.<sup>8</sup>

## SECTION 4.—GRATUITOUS ALIENATIONS UNDER ACT 1621, c. 18.

SUBSECTION (1).—*Terms of Act.*

**211.** This Act, which was based mainly on the *Actio Pauliana* of the Roman law,<sup>9</sup> was in form a confirmation of an Act of the Lords of Council and Session made against dyvours and bankrupts at Edinburgh the 12th day of July 1620. After a lengthened preamble reciting the evils arising from the frauds of bankrupts, practised by means of simulate alienations to their wives, children, kinsmen, allies, and other

<sup>1</sup> *M'Cowan v. Wright*, 1852, 14 D. 968 ; 1853, 15 D. 494 ; Goudy on Bankruptcy, 4th ed., 41.

<sup>2</sup> Goudy on Bankruptcy, 4th ed., 42 ; *M'Cowan v. Wright*, *supra* ; *M'Dougall's Tr. v. Ironside*, 1914 S.C. 186.

<sup>3</sup> Para. 198, *supra*.

<sup>4</sup> *M'Cowan v. Wright*, *supra*.

<sup>5</sup> See the corresponding section (9) in the Bankruptcy Act, 1913. <sup>6</sup> Ersk. iv. 1, 44.

<sup>7</sup> Bell, Com. ii. 227 ; see also Goudy on Bankruptcy, 4th ed., 42 ; Mackay, Manual, 407.

<sup>8</sup> See *infra*, para. 266 *et seqq.*

<sup>9</sup> Dig. 42, 8.



confident and interposed persons, the Act provides as follows :—" For remeed whereof, the said Lordes, according to the powers given unto them by His Majestie and his most noble progenitors, to set downe orders for administration of justice : meaning to follow and practise the good and commendable lawes, civil and canon, made against fraudulent alienations, in prejudice of creditors, and against the authors and partakers of such fraude ; statutes, ordaines, and declares, That in all actions, and causes depending, or to be intended by any true creditor, for recoverie of his just debt, or satisfaction of his lawful action and right : They will decreete and decerne, all alicnations, dispositions, assignations, and translations whatsoever, made by the debtor, of any of his lands, teindes, reversions, actions, debtes, or goods whatsoever, to any conjunct or confident person, without true, just, and necessarie causes, and without a just price really payed, the same beeing done after the contracting of lawful debts from true creditors : To have beene from the beginning, and to be in all times comming, null, and of none availe, force, nor effect : at the instance of the true and just creditor, by way of action, exception, or reply : without further declarator. And in case any of His Majesties good subjects (no wayes partakers of the saids fraudes) have lawfully purchased any of the saids bankrupts landes or goods, by true bargaines, for just and competent pryces, or in satisfaction of their lawful debts, from the interposed persons, trusted by the said dyvours. In that case, the right lawfully acquired by him who is no-wayes partaker of the fraude, shall not be annulled in manner foresaid. But the receiver of the pryce of the saids lands, goods and others, from the buyer, shall be holden and oblised to make the same forth-comming to the behoove of the bankruptes trew creditors, in payment of their lawful debts. And it shall be sufficient probation of the fraud intended against the creditors, if they, or any of them, shall be able to verifie by writte, or by oath, of the partie receiver of any securitie from the dyvour or bankrupt, that the same was made without any true, just, and necessarie cause, or without any true and competent price : Or that the landes and goods of the dyvour and bankrupt beeing sold by him who bought them from the said dyvour, the whole, or the most part of the price thereof was converted, or to be converted to the bankruptes profite and use. Providing alwayes, that so much of the saids landes and goods, or prices thereof so trusted by bankrupts to interposed persons, as hath beene really payed, or assigned by them to any of the bankrupts lawful creditors, shall be allowed unto them, they making the rest forth-comming to the remanent creditors, who want their due payments."

#### SUBSECTION (2).—*Statutory Presumptions.*

**212.** The Act differs in its operation from the common-law rule against gratuitous alienations during insolvency, in respect that it is applicable only to alienations made to "any conjunct or confident

person." Further, in applying the Act the challenging creditor has been accorded by the Court the benefit of two presumptions. These are, that if it be admitted or proved that the grantee is a conjunct or confident person, and that the debtor is insolvent, it is presumed: (1) that the debtor was insolvent at the date of the alienation; and (2) that the alienation was granted without any consideration such as is required to elide the Act. The onus of rebutting these presumptions by proof to the contrary is thus thrown on the defender.<sup>1</sup>

### SUBSECTION (3).—*Alienations Challengeable.*

**213.** It is a question whether the Act differs further from the common law in striking only at rights depending on writing. This question is not clearly determined by decision. The kinds of alienation expressly mentioned in the Act include "alienations" of "goods."<sup>2</sup> The construction of the Act, moreover, has proceeded on the footing that the particular cases specified in it are examples merely, and not restrictive.<sup>3</sup> There is no ground of principle for holding the rule of the Act applicable only to written rights; and in the case of the Act 1696, c. 5, the construction adopted by the Court has rejected the literal meaning of the words "dispositions, assignations, or other deeds," and admitted the Act to apply to all alienations of the character struck at by the Act, whether dependent on writing or not.<sup>4</sup> On the other hand, the language used by the institutional writers and in the decided cases regarding the Act seems to assume that it applies only to written rights;<sup>5</sup> and it has been generally considered that transferences of assets without writing, as, *e.g.*, delivery of goods, do not fall under the Act.<sup>6</sup>

**214.** The kinds of alienation struck at by the Act include not merely direct conveyances of property, but every transaction by which the debtor's estate is diminished, either directly or indirectly,<sup>7</sup> as, *e.g.*, the discharge of a debt,<sup>8</sup> the abandonment of defences to an action,<sup>9</sup> the purchase with money handed over by the debtor of property which is conveyed direct by the seller to the conjunct or confident person,<sup>10</sup> or a preconcerted decree allowed to pass in absence.<sup>11</sup> Obligatory documents, such as bonds and promissory notes, on which diligence may be used,

<sup>1</sup> Bell, Com. ii. 172, 179.

<sup>2</sup> See definition of "alienation" in Ersk. iv. 1, 29.

<sup>3</sup> Mackenzie, Obs. in Works, ii. 8; *Thomas v. Thomson*, 1865, 3 M. 1160, per L. J.-C. Inglis.

<sup>4</sup> See *Forbes v. Forbes Drs.*, 1715, Mor. 1124; Bell, Com. ii. 196.

<sup>5</sup> Stair, i. 9, 15; Ersk. iv. 1, 29; Bell, Com. ii. 174.

<sup>6</sup> Goudy on Bankruptcy, 4th ed., 44; *Dobie v. Mitchell*, 1854, 17 D. 97; *Main v. Fleming's Tr.*, 1881, 8 R. 880; *Thomas v. Thomson*, 1865, 3 M. 1160; cp. *Forbes v. Forbes Drs.*, *supra*; *North British Rly. Co. v. White*, 1882, 20 S.L.R. 129.

<sup>7</sup> Stair, i. 9, 15; Ersk. iv. 1, 29; Bell, Com. ii. 174.

<sup>8</sup> *Laing v. Cheyne*, 1832, 10 S. 200.

<sup>9</sup> *Wilson v. Drummond's Reps.*, 1853, 16 D. 275.

<sup>10</sup> *Bolden v. Ferguson*, 1863, 1 M. 522.

<sup>11</sup> Mackenzie's Works, ii. 8.

are held to fall under the Act ;<sup>1</sup> as also leases.<sup>2</sup> But a mere acknowledgment of debt or voucher does not seem to fall under the Act.<sup>3</sup> The transfer of a right which is not attachable by creditor's diligence is, in the opinion of Professor Bell, not impeachable under the Act.<sup>4</sup> It has been held, however, that the gratuitous alienation of a *spes successionis* by a sequestrated bankrupt was reducible,<sup>5</sup> and the principle of the decision seems applicable to such an alienation granted during insolvency, before actual bankruptcy.

#### SUBSECTION (4).—*Conjunct and Confident Persons.*

**215.** The terms "conjunct or confident" are amplified in the preamble of the Act into "wives, children, kinsmen, allies, and other confident and interposed persons." It is only where the alienation is to a conjunct or confident person that the Act applies.<sup>6</sup>

##### (i) *Conjunct Persons.*

In the early decisions the test of relationship in the application of the word "conjunct" was generally taken to be the same as for the declinature of a judge under the Acts 1594, c. 216, and 1681, c. 13. According to this test, parents and children, brothers and sisters, uncles and aunts, nephews and nieces, are "conjunct";<sup>7</sup> so are parents and children, and brothers and sisters by affinity,<sup>8</sup> but not uncle and nephew by affinity.<sup>9</sup> The husband of a wife's sister, however, was held in one case not to be conjunct.<sup>10</sup> It has not been decided whether a cousin is conjunct.<sup>11</sup> Intending spouses entering into a marriage contract have been held to fall within the statutory definition.<sup>12</sup>

##### (ii) *Confident Persons.*

The term "confident" does not imply relationship. "The principle of the rule applies to every situation of intimate and confidential intercourse. It seems to comprehend partners in trade, servants, factors, confidential men of business."<sup>13</sup> "By confident persons are meant those in whom the granter is presumed to place an uncommon trust from his employing them in certain offices about

<sup>1</sup> *Wightman v. Johnston*, 1700, 4 Bro. Supp. 477 ; *Belch* (1808), Bell, Com. ii. 177, note ; *Thomas v. Thomson*, *supra* ; cp. *Matthew's Tr. v. Matthew*, 1867, 5 M. 957.

<sup>2</sup> *Kyd v. Gorrie*, 1890, 17 R. 1051.

<sup>3</sup> *Thomas v. Thomson*, *supra* ; *Matthew's Tr. v. Matthew*, *supra*.

<sup>4</sup> Bell, Com. ii. 178-9.

<sup>5</sup> *Obers v. Paton's Tr.*, 1897, 24 R. 719.

<sup>6</sup> *Wilson v. Drummond's Reps.*, 1853, 16 D. 275.

<sup>7</sup> *Tarpersie's Crs. v. Kinfawns*, 1673, Mor. 900 ; *Brown v. Murray*, 1754, Mor. 886.

<sup>8</sup> *Hume v. Smith*, 1673, Mor. 899 ; *Mercer v. Dalgarno*, 1694, Mor. 12563.

<sup>9</sup> *Elibank v. Adamson*, 1712, Mor. 12569.

<sup>10</sup> *M'Gowan v. M'Kellar*, 1826, 4 S. 498.

<sup>11</sup> *Sinclair v. Dickson*, 1680, Mor. 12562 ; *M'Dowal v. Fullarton*, 1714, Mor. 12569.

<sup>12</sup> *M'LAY v. M'Queen*, 1899, 1 F. 804.

<sup>13</sup> Bell, Com. ii. 175 ; see *ibid.* as to Law Agents.



his person or estate, as a doer, steward, or domestic servant.<sup>1</sup> But whether a person is to be regarded as "confident" depends on the circumstances of each particular case. Trustees under an ordinary trust settlement are not confident with the beneficiaries.<sup>2</sup> A constituent has been held not confident with his factor.<sup>3</sup> It was said, however, that the factor might be confident with his constituent.<sup>3</sup> In one case the debtor's paramour and bastard children were apparently regarded as falling within the category of conjunct and confident in relation to him.<sup>4</sup> The onus of proving the grantee to be conjunct or confident with the debtor lies on the creditor challenging the transaction.<sup>5</sup>

SUBSECTION (5).—*Non-onerosity of Transaction Challenged.*

(i) *Onus of Proof.*

216. To render an alienation liable to challenge under the Act, it is necessary that it has been granted "without true, just, and necessary causes, and without a just price really paid." The terms of the Act would seem intended to throw the onus of proving non-onerosity on the creditor making the challenge. But the rule has for long been established by the Courts, that if it is admitted or proved that the debtor is insolvent and the grantee a conjunct or confident person, the onus is on the grantee of negating the presumption that the deed was gratuitous, as well as a presumption that the debtor was insolvent when he granted it.<sup>6</sup>

(ii) *Nature of Proof.*

217. The proof as to onerosity may be by parole.<sup>7</sup> The terms of the deed are not in themselves sufficient to displace the presumption of non-onerosity.<sup>8</sup> Nor is the oath of the grantee in supplement of the terms of the deed conclusive.<sup>9</sup> Bell states that "where the narrative bears gratuitous causes, it is considered as confirming so strongly the presumption of gratuitousness that the law holds it as ultimate evidence of no valuable consideration having been given."<sup>10</sup> In the case of *Hodge v. Morrisons*<sup>11</sup> parole evidence to

<sup>1</sup> Ersk. iv. 1, 31; see *Edmond v. Grant*, 1853, 15 D. 703; *Bank of Scotland v. Gardiner*, 1906, 14 S.L.T. 146; 1907, 15 S.L.T. 229 (case of a private secretary).

<sup>2</sup> *Young v. Darroch's Trs.*, 1835, 13 S. 305; see *Watson v. Grant's Trs.*, 1874, 1 R. 882.

<sup>3</sup> *Buccleuch v. Sinclair*, 1728, Mor. 12573.

<sup>4</sup> *Ballantyne v. Dunlop*, 17th Feb. 1814, F.C.; see *Laing v. Cheyne*, 1832, 10 S. 200.

<sup>5</sup> Bell, Com. ii. 175.

<sup>6</sup> Bell, Com. ii. 172, 179; *Riddoch v. Younger*, 1639, Mor. 12554; *Hamilton v. Boyd*, 1670, Mor. 12555; *Whitehead v. Lidderdale*, 1671, Mor. 12557; *Stansfield v. Pittachope*, 1676, Mor. 954; *Napier v. Gordon*, 1670, Mor. 3755.

<sup>7</sup> *Laing v. Cheyne*, 1832, 10 S. 200; *Matthew's Tr. v. Matthew*, 1867, 5 M. 957, per L. P. Inglis; *Hodge v. Morrisons*, 1883, 21 S.L.R. 40.

<sup>8</sup> Bell, Com. ii. 179; *Whitehead v. Lidderdale*, *supra*; *Rule v. Purdie*, 1711, Mor. 12566; *McKies v. Aquon*, 1739, Mor. 12574.

<sup>9</sup> *Hamilton v. Boyd*, *supra*; *Auld v. Smith*, 1629, Mor. 12552; *North British Rly. Co. v. Whit.*, 1882, 20 S.L.R. 129.

<sup>10</sup> Com. ii. 179. <sup>11</sup> *Supra*.



negative the terms of deeds which purported to be gratuitous was admitted and considered; but as the Court held the grantor to have been solvent at the date of the deeds, the proof of onerosity was unnecessary to the decision of the case. Lord Rutherford Clark, who dissented from the decision, said: "The deeds bear to be gratuitous. I have considerable doubt whether, in such a question as this, it is open to the grantors to allege and prove, contrary to their tenor, that they were granted for onerous considerations. But it is very clear to my mind that, if they are allowed to do so, the allegation of onerosity must be very precise, and supported by abundant evidence." The production of a prior obligatory deed, duly authenticated, if not itself challenged, will be generally held conclusive proof.<sup>1</sup>

#### SUBSECTION (6).—*Delay in Challenge.*

218. If the challenge does not take place until forty years after the date of the alienation, the grantee is not bound to prove onerosity;<sup>2</sup> and where there is *mora* and taciturnity for a long period, short of the prescriptive one, slight evidence will be sufficient to rebut the legal presumption; "in all questions of computation, the creditors are not entitled, after a long delay, to go very narrowly to work in their reckonings, but the question is to be taken on a broad and fair and rather favourable view for the debtor."<sup>3</sup>

#### SUBSECTION (7).—*Kinds of Onerosity.*

##### (i) *Cash Payments.*

219. Value in money, or money's worth, must be fairly adequate in amount.<sup>4</sup> "In proving the consideration of the deed, every case must depend on its own circumstances. It may be observed, however, in general: (1) It is not in all cases necessary to prove that the highest price possible has been got for the subject, but quite sufficient if what is commonly called a fair price has been received, *i.e.* a price which, in the whole circumstances of the case, indicates a fair and *bona-fide* transaction. A sale of the subject soon after the conveyance, without any material change of market or of circumstances, will afford sufficient evidence of the value. But all circumstances which have affected the price of that sort of property are proper to be considered in estimating *ex eventu* the value as at any particular time which is past. (2) In estimating the value of a contingent interest, as an annuity which has been alienated, it seems

<sup>1</sup> *Rule v. Purdie*, 1711, Mor. 12566; *Skene v. Forbes*, 1728, Mor. 12572; *M'Kies v. Agnew*, *supra*.

<sup>2</sup> *Blackwood v. Hamilton's Crs.*, 1749, Mor. 904; *Elliot v. Elliot*, 1749, Mor. 905; *Guthrie v. Gordon*, 1711, Mor. 1020; Bell, Com. ii. 181.

<sup>3</sup> Bell, Com. ii. 181.

<sup>4</sup> *Ibid.*, ii. 177; see *Glencairn v. Birsbanc*, 1677, Mor. 1011; *Hodge v. Morrisons*, 1883, 21 S.L.R. 40.

inadmissible to take the value *ex eventu*. It must be taken as *in prospectu* at the time of the alienation, and the value which such an annuity would then have given in the market is the true and just consideration for which alone it can be alienated to the prejudice of creditors. (3) Where the deed objected to is a bond, bill, or other voucher of debt, such evidence as would be relevant in an action of constitution of the debt will be sufficient to establish value in a question upon this statute.”<sup>1</sup> The apparent price must not only be a “just price” in point of amount, but be also really paid. Thus it was held relevant that the apparent price, though counted and paid over, was not substantially and really paid, and did not, from any proofs of its existence with or application by the debtor, appear to have come to his use.<sup>2</sup> “The law presumes a collusion, which the mere shew of a payment will not sufficiently refute.”<sup>3</sup>

### (ii) *Prior Legal Obligation.*

**220.** It is sufficient to elide the statute if the alienation is granted in order to fulfil or satisfy a previously existing legal obligation of the debtor, and that whether the alienation amounts to specific implement or is intended as satisfaction in another form, or is given in security. Thus the Act was held not to apply to a disposition granted by an insolvent in satisfaction of the price of certain victual sold and delivered to him a month previously,<sup>4</sup> nor to an assignation granted by a client to her agent in satisfaction of an account incurred by him to an Edinburgh agent on her behalf.<sup>5</sup> Similarly, a security given to a cautioner in relief of his liability does not fall under the Act.<sup>6</sup> And where daughters living in family with their father contributed from their earnings to the support of the house, this was held a sufficient cause to sustain an assignation of long leases by him in their favour.<sup>7</sup>

### (iii) *Antenuptial Marriage Contract Provisions.*

**221.** *Marriage* constitutes a just cause in the sense of the Act, and provisions made by an antenuptial marriage contract in favour of the wife or the issue of the marriage are protected, so far as reasonable in amount.<sup>8</sup> The question of reasonable amount depends

<sup>1</sup> Bell, Com. ii. 179–80.

<sup>2</sup> *M'Arthur v. Gibson* (1819), Bell, Com. ii. 177, note; see also *North British Rly. Co. v. White*, 1882, 20 S.L.R. 129.

<sup>3</sup> Bell, Com. ii. 177.

<sup>4</sup> *Laird of Birkinbog v. Grahame*, 1671, Mor. 881.

<sup>5</sup> *A. v. B.*, 17th Nov. 1837, F.C.; see also *Mansfield v. Stuart*, 1833, 11 S. 389; *Horne v. Hay*, 1847, 9 D. 651; *Williamson v. Allan*, 1882, 9 R. 859.

<sup>6</sup> *Thomas v. Thomson*, 1866, 5 M. 198.

<sup>7</sup> *Hodge v. Morrisons*, 1883, 21 S.L.R. 40; see also *Dawson v. Thorburn*, 1888, 15 R. 891; *Taylor v. Jones*, 1888, 15 R. 328; *Thomson v. Thomson's Trs.*, 1889, 16 R. 333; *Kyd v. Gorrie*, 1890, 17 R. 1051.

<sup>8</sup> *Lockhart v. Dundas*, 1714, Mor. 956; *Blackburn v. Oliver*, 29th May 1816, F.C.; *Garden v. Stirling*, 1822, 2 S. 39; *M'Lachlan v. Campbell*, 1824, 3 S. 192; *Carphin v. Clapperton*, 1867, 5 M. 797; *Watson v. Grant's Trs.*, 1874, 1 R. 882; Bell, Com. ii. 176–7.

on the circumstances of the parties.<sup>1</sup> If the provisions are excessive, it is thought they may be reduced *quoad excessum*, but that has been doubted.<sup>2</sup> As to the form of challenge, see per Lord Ormisdale in *Watson v. Grant's Trs.*<sup>3</sup> Provisions made by the parents of the spouses as part of the marriage compact are treated on the same footing.<sup>4</sup> An antenuptial provision by an uncle in favour of his nephew's wife was held onerous *quoad* the wife, and not reducible under the Act.<sup>5</sup> If the insolvency of the granter of the provision was within the knowledge of the grantee or notorious in character, the element of fraud or *mala fides* may vitiate the transaction.<sup>6</sup>

#### (iv) *Postnuptial Provisions.*

**222.** Postnuptial settlements lack the element of onerosity which is imparted to antenuptial settlements by reason of the marriage taking place on the faith of them; and prior to the Married Women's Property (Scotland) Act of 1920, it was not clearly settled how far the natural obligation of a husband to provide for his wife after his death constituted a just cause of granting under the Act, to support a postnuptial settlement made during his insolvency.<sup>7</sup> Since the Act, the question has not been judicially settled. Reference is made to the provisions of the Act 1920 as set forth under Gratuitous Alienations at Common Law in connection with Postnuptial Settlements, and to the opinion there expressed as to the effect of the Act.<sup>8</sup> Postnuptial provisions to children are not protected.<sup>9</sup> The claim of a natural child for maintenance is that of a creditor of the father;<sup>10</sup> and a provision by the father, of an extent not exceeding his obligation of maintenance, will not be reducible under the Act.

#### (v) *Policies of Assurance.*

**223.** As to policies of assurance in favour of a wife or children under the Married Women's Policies of Assurance (Scotland) Act, 1880, reference may be made to what has been said under Gratuitous Alienations at Common Law.<sup>11</sup>

<sup>1</sup> See under Gratuitous Alienations at Common Law, *supra*, para. 191.

<sup>2</sup> *M'Lachlan v. Campbell*, 1824, 3 S. 192; *Carphin v. Clapperton*, 1874, 1 R. 882; *Watson v. Grant's Trs.*, 1867, 3 M. 797; cp. *M'Lay v. M'Queen*, 1899, 1 F. 804.

<sup>3</sup> *Watson v. Grant's Trs.*, *supra*.

<sup>4</sup> *Ersk. iv. 1, 33*; *Blackburn v. Oliver*, 29th May 1816, F.C.; *Scott v. Ross*, 1822, 1 S. 481; *Garden v. Stirling*, 1822, 2 S. 39.

<sup>5</sup> *Thoirs' Crs. v. Middleton*, 1729, Mor. 984.

<sup>6</sup> *Wood v. Reid*, 1680, Mor. 977; *Ersk. iv. 1, 33*; see *M'Lay v. M'Queen*, *supra*; *Angus' Tr. v. Angus*, 1901, 4 F. 181.

<sup>7</sup> *Campbell v. Campbell's Crs.*, 1744, Mor. 988; *Urquhart's Crs. v. Urquhart*, 1737, Elch. voce "Fraud," No. 8; *M'Kenzie v. Monro*, 1738, Mor. 958; cp. *Sharp v. Christie*, 1839, 1 D. 396; *Guthrie v. Cowan*, 1846, 9 D. 124; *Fraser, H. & W. ii. 1501*; *M'Laren on Wills and Succession*, i. 667.

<sup>8</sup> *Supra*, para. 194.

<sup>9</sup> *Stair, i. 9, 15*; *Ersk. iv. 1, 34*; see *Globe Insurance Co. v. Murray*, 1854, 17 D. 216.

<sup>10</sup> *Downs v. Wilson's Tr.*, 1886, 13 R. 1101; *Valentine v. Reimers*, 1892, 19 R. 519; see *Ballantyne v. Dunlop*, 17th Feb. 1814, F.C.

<sup>11</sup> See para. 196, *supra*.



SUBSECTION (8).—*Insolvency of Debtor.*

**224.** Alienations struck at by the Act are prohibited if made “after the contracting of lawful debt,” and the Act does not expressly postulate insolvency at the date of granting, but this has been construed by decision to be the condition of its application.<sup>1</sup> It is enough, however, if the alienation challenged has the effect of making the granter insolvent.<sup>2</sup> The onus of proving insolvency at the date of the challenge, if disputed, lies on the challenging creditor;<sup>3</sup> but if it is established, and if the alienation be admitted or proved to be in favour of a conjunct or confident person, there is a presumption that the granter was insolvent at the date of the grant, and the onus of proof is thrown upon the grantee.<sup>4</sup> The insolvency at the date of the alienation must be insolvency in the sense of an absolute deficiency of assets, for if the debtor can shew that he had sufficient funds to meet his debts, taking a fair balance of assets and liabilities at the date of the deed, after allowing for any subsequent fall in the market value of his property, the action will fail.<sup>5</sup> When the challenge is only made after a long lapse of time, the presumption of insolvency, like that of non-onerosity, will have little weight attached to it.<sup>6</sup>

SUBSECTION (9).—*Title to Challenge.*

**225.** While the Act gives the right of challenge to “any true creditor,” this has been held to mean prior creditors, *i.e.* creditors whose grounds of debt are prior in date to the alienation challenged.<sup>7</sup> But posterior creditors who have acquired right to the debts of prior creditors have a right to challenge. In the case of debts not resting on writing, but provable by witnesses, it is enough if the date of contracting be prior to the alienation, although the debts have not been constituted by decree till subsequently;<sup>8</sup> and a gratuitous disposition was reduced at the instance of a prior onerous creditor under an implied warrandice, although the decree establishing the debt upon the incurring of the warrandice was not obtained until after the disposition.<sup>9</sup> Creditors

<sup>1</sup> *Garthland v. Ker*, 1632, Mor. 915; *Clerk v. Stewart*, 1675, Mor. 917.

<sup>2</sup> *Meldrum's Crs. v. Kinnier*, 1717, Mor. 928; *Queensberry v. Mouswell*, 1677, Mor. 961; *Carphin v. Clapperton*, 1867, 5 M. 797; cp. *M'Lay v. M'Queen*, 1899, 1 F. 804, per Lord M'Laren.

<sup>3</sup> *Bolden v. Ferguson*, 1863, 1 M. 522; *M'Cowan v. Wright*, 1852, 14 D. 968.

<sup>4</sup> Bell, Com. ii. 172, 180; *Hohwell v. Cuming*, 1796, Mor. 11583; *Bolden v. Ferguson*, *supra*.

<sup>5</sup> Stair, i. 9, 15; Bell, Com. ii. 180; *M'Kell v. Jamieson*, 1680, Mor. 920; *M'Kenzie v. Fletcher*, 1712, Mor. 924; *Hodge v. Morrisons*, 1883, 21 S.L.R. 40; see further under *Gratuitous Alienations at Common Law*, *supra*, para. 197.

<sup>6</sup> Bell, Com. ii. 181.

<sup>7</sup> Stair, i. 9, 15; Ersk. iv. 1, 44; *Mansfield v. Stuart*, 1833, 11 S. 389; *M'Cowan v. Wright*, 1852, 14 D. 968; *Edmond v. Grant*, 1853, 15 D. 703; cp. Bell, Com. ii. 172-3; and per Lord Curriehill (Ordinary) in *Edmond v. Grant*, *supra*.

<sup>8</sup> *Pollock's Crs. v. Pollock*, 1669, Mor. 1002; *Street v. Masson*, 1669, Mor. 1003.

<sup>9</sup> *Cuthcart v. Glass*, 1679, Mor. 1005.



whose claims are contingent or conditional, or postponed in ranking, are not barred from challenging, but the contingency or condition must be purified before the challenge can be made effectual.<sup>1</sup> Gratuitous creditors are entitled to challenge under the Act alienations granted during supervening insolvency of the debtor.<sup>2</sup>

**226.** A trustee on a sequestrated estate, "whether representing prior creditors or not," is entitled to set aside any deed or alienation for behoof of the whole body of creditors, and in doing so is entitled to the benefit of any presumption which would have been competent to any creditor.<sup>3</sup> It is therefore no longer necessary for such a trustee to represent prior creditors. The trustee's title does not, however, evacuate the title of an individual creditor.<sup>4</sup> The title of a trustee under a foreign bankruptcy who represents prior creditors has been recognised as entitling him to the estate forming the subject of the transaction challenged.<sup>5</sup> A trustee under a private trust deed granted by the debtor may challenge alienations, provided (1) the trust deed expressly empowers him to do so, and (2) creditors, having themselves a title to challenge, accede to the trust deed, thereby impliedly constituting the trustee their representative.<sup>6</sup>

**227.** The debtor cannot himself make the challenge, unless he has been reinvested in his estate by discharge on composition contract in sequestration, and has obtained an express assignation of the right of challenge from the creditors.<sup>7</sup> And, similarly, a purchaser of the bankrupt estate does not acquire a title without express assignation.<sup>8</sup>

#### SUBSECTION (10).—*Effect of Successful Challenge.*

**228.** The effect of a successful challenge under the Act "is simply to restore the alienated subject to the position in which it was before the alienation. It becomes assets of the bankrupt's estate, and may be attached by the diligence of the creditor who has established the nullity, and also by other creditors whose claims are prior in time to the alienation. The reduction of a fraudulent alienation does not give the creditor any right against the assignee to require payment or delivery of the subject to himself."<sup>9</sup> It may sometimes happen that the effect of the reduction is to establish a preference in another creditor. Thus where a creditor arrested a ship which, prior to the arrestment, had been registered as belonging to the debtor's son in virtue of a conveyance

<sup>1</sup> Bell, Com. ii. 173; Goudy on Bankruptcy, 4th ed., 52.

<sup>2</sup> Bell, Com. ii. 174.

<sup>3</sup> B.A., 1913, s. 9; *Neil's Tr. v. British Linen Co.*, 1898, 36 S.L.R. 139.

<sup>4</sup> *Brown & Co. v. M'Callum*, 1890, 18 R. 311.

<sup>5</sup> *Obers v. Paton's Trs.*, 1897, 24 R. 719.

<sup>6</sup> *Fleming's Trs. v. M'Hardy*, 1892, 19 R. 542; see *M'Laren's Tr. v. National Bank of Scotland*, 1897, 24 R. 920.

<sup>7</sup> Goudy on Bankruptcy, 4th ed., 53; Wallace on Bankruptcy, 2nd ed., 20.

<sup>8</sup> *Smith & Co. v. Smyth*, 1889, 16 R. 392.

<sup>9</sup> *Cook v. Sinclair & Co.*, 1896, 23 R. 925, per Lord M'Laren; Bell, Com. ii. 183.

voidable under the Act, a subsequent reduction of the conveyance by the trustee in the debtor's sequestrated estate was held to let in the creditor's arrestment and effectuate his preference thereon.<sup>1</sup>

### SUBSECTION (11).—*Form of Challenge.*

**229.** By the words of the Act, alienations of the kind described are declared to have been from the beginning, and to be in all time coming, "null and of none avail, force, nor effect by way of action, exception, or reply, without further declarator." By the Bankruptcy Act, 1913 (s. 8), the challenge may be made either by way of action or exception, both in the Court of Session and Sheriff Court. Exception includes answer in replication. Thus, if the title of the alienee is pleaded in defence to an action otherwise competent, the Act of Parliament or the rule of the common law may be pleaded in reply.<sup>2</sup> Where the challenge is made by an individual creditor by a direct action, it must be in the form of an action of reduction in the Court of Session, if it involves the setting aside of a deed of alienation; but if there is no deed requiring reduction, the challenge may be by action of declarator either in the Court of Session or in the Sheriff Court.<sup>3</sup> There is, however, doubt as to the application of the Act to transferences not dependent on writing.<sup>4</sup> It is competent for a creditor to combine with reductive conclusions a conclusion against the bankrupt for payment of his claim, so as to enable him to do diligence on his decree against the fund when the transaction under challenge has been reduced.<sup>5</sup> A trustee for creditors, having a title to receive the bankrupt's assets, may, along with other necessary conclusions, insist in conclusions for delivery or count and reckoning.<sup>6</sup> When the action is by a trustee in a sequestration, the effect is to make the subject available through him to "the whole body of creditors," both prior and posterior.<sup>7</sup>

**230.** The requisite averments in a challenge under the Act are: (1) that the alienee is conjunct or confident with the debtor; (2) that the alienation was granted without true, just, and necessary cause, and without a just price really paid; (3) that the debtor was insolvent at the date of the alienation; (4) that the debtor is insolvent at the date of the action; and (5) that the pursuer is either (a) a prior creditor, (b) a trustee in sequestration, or (c) a trustee having a title to represent prior creditors.<sup>8</sup> As already explained, the pursuer only requires to prove

<sup>1</sup> *Bell v. Young's Tr.*, 1862, 1 M. 183.

<sup>2</sup> *Cook v. Sinclair & Co.*, 1896, 23 R. 925, per Lord M'Laren; see *Dickson v. Murray*, 1866, 4 M. 797; *Mackenzie v. Calder*, 1868, 6 M. 833; *Moroney & Co. v. Muir & Sons*, 1867, 6 M. 7.

<sup>3</sup> *M'Laren's Tr. v. National Bank of Scotland*, 1897, 5 S.L.T. 40; 24 R. 920; Sheriff Courts Act, 1907, s. 5 (1).

<sup>4</sup> *Supra*.

<sup>5</sup> *Cook v. Sinclair & Co.*, *supra*, per Lord M'Laren.

<sup>6</sup> Goudy on Bankruptcy, 4th ed., 55.

<sup>7</sup> Bankruptcy Act, 1913, s. 9.

<sup>8</sup> Juridical Styles, iii. 79.

(1), (4), and (5) of these averments. If these are proved, (2) and (3) are presumed, and the onus of disproving them lies on the defender. The action may, in the Court of Session, be tried either with or without a jury, but in practice the latter course is now usually adopted.<sup>1</sup>

SUBSECTION (12).—*Effect as regards Third Parties where Deed Annulled.*

231. The provision in the Act,<sup>2</sup> protecting third parties who have onerously and in *bona fide* acquired the subject alienated from the grantee, expresses what is the common-law rule.<sup>3</sup> It is necessary that the third party shall have been ignorant of the nature of his author's right.<sup>4</sup> It is not decided whether an adjudger from the grantee is entitled to the same protection as a purchaser.<sup>5</sup>

#### SECTION 5.—ALIENATIONS DURING INSOLVENCY IN DEFRAUD OF DILIGENCE UNDER ACT 1621, c. 18.

SUBSECTION (1).—*Provisions of Act.*

232. The provisions of the Act on this head are as follows :—

“ And if in time comming any of the saids dyvours, or their interposed partakers of their fraude, shall make any voluntarie payment or right to any person in defraude of the lawful and more timely diligence of another creditor, having served inhibition, or used horning, arreastment, comprizing, or other lawful meane, duely to affect the dyvour's lands, or goods, or price thereof to his behoove. In that case the said dyvour or interposed person shall be holden to make the same forthcomming to the creditor having used his first lawful diligence : who shall likewise bee preferred to the concreditor who beeing posterior unto him in diligence hath obtained payment by the partial favour of the debtor or of his interposed confident, and shall have good action to recover from the said creditor that which was voluntarily paid in defraude of the pursuer's diligence.”

SUBSECTION (2).—*Alienations Challengeable.*

233. The “ voluntarie payment or right ” may be one made in any form, direct or indirect, and, unlike the alienations struck at in the first branch of the Act, may be in favour of a stranger. A trust disposition

<sup>1</sup> Mackay, Manual, 409. As to form of issue, see *Bolden v. Ferguson*, 1863, 1 M. 522 ; *Caird v. Key*, 1857, 20 D. 187.

<sup>2</sup> *Supra*.

<sup>3</sup> *Williamson v. Sharp*, 1851, 14 D. 127.

<sup>4</sup> *Hay v. Jamieson*, 1672, Mor. 1009 ; see *Caird v. Key*, *supra*. As to proof of knowledge and the presumptions which are applied, see Bell, Com. ii. 183 ; *Hay v. Jamieson*, *supra* ; *Gordon v. Ferguson*, 1679, Mor. 1012 ; *Allan v. Thomson*, 1730, Mor. 1022 ; *Caird v. Key*, *supra*.

<sup>5</sup> Bell, Com. ii. 182.

for behoof of all the creditors of the granter may be set aside under this branch of the Act.<sup>1</sup> There is no limitation to alienations made in writing. The alienation challenged must have been granted voluntarily. As under the first branch of the Act, payments in cash of debts due are not liable to challenge,<sup>2</sup> nor are *nova debita*.<sup>3</sup> There is a question whether deeds granted in implement of a prior legal obligation fall under this branch of the Act.<sup>4</sup> Alienations under pressure of personal diligence are not voluntary within the meaning of the Act.<sup>5</sup> And a conveyance to a creditor who, though his diligence may have begun later than that of the challenging creditor, has a right to perfect it sooner, will be protected.<sup>6</sup>

#### SUBSECTION (3).—*Insolvency of Debtor.*

**234.** The insolvency of the debtor at the time of the alienation challenged must have been notorious. If the insolvency is secret and, in particular, unknown to the grantee, the challenge will not be successful.<sup>7</sup> Actual collusion on the part of the grantee is not required.<sup>8</sup>

#### SUBSECTION (4).—*Title to Challenge.*

**235.** The title to challenge is in creditors who, prior to the alienation, have begun to use such diligence against the debtor's estate as would, if not interrupted, legally affect the subject alienated. The diligence must be regular and formal, and be prosecuted in due course and without any unfair or improper delay.<sup>9</sup>

#### SUBSECTION (5).—*Effect of Successful Challenge.*

**236.** A successful challenge under this branch of the Act, while it protects the diligence of the challenging creditor, has the same effect *quoad* third parties as in the case of challenge of alienations under the first branch of the Act.<sup>10</sup>

<sup>1</sup> *Grant v. M'Edward's Trs.*, 1835, 13 S. 424; *M'Kenzie v. Calder*, 1868, 6 M. 833.

<sup>2</sup> *Forbes v. Brebner*, 1751, Mor. 1042, and Elch. voce "Bankrupt," No. 26; cp. *Veitch v. Pallat*, 1675, Mor. 1029.

<sup>3</sup> Bell, Com. ii. 188.

<sup>4</sup> Goudy on Bankruptcy, 4th ed., 58–59; *Mansfield v. Walker's Trs.*, 1833, 11 S. 813; cp. Bell, Com. ii. 189.

<sup>5</sup> *Gordon v. Bogle*, 1724, Mor. 1041.

<sup>6</sup> *Gellatly v. Stewart*, 1688, Mor. 1053; *Mansfield v. Walker's Trs.*, *supra*, per Lord Glenlee.

<sup>7</sup> Bell, Com. ii. 186; *Royal Bank of Scotland v. Kennedy*, 1708, Mor. 1057; *Tweedie v. Din*, 1715, Mor. 1037.

<sup>8</sup> *Grant v. M'Edward's Trs.*, 1835, 13 S. 424; *Mackenzie v. Calder*, 1868, 6 M. 833; Goudy on Bankruptcy, 4th ed., 59.

<sup>9</sup> Bell, Com. ii. 186.

<sup>10</sup> *Ibid.*, ii. 190.



## PART II.—BANKRUPTCY.

## SECTION 1.—PRELIMINARY.

**237.** The term “Bankruptcy,” as used in the law of Scotland, has no fixed technical meaning. It may be used to denote (1) *simple insolvency*, or the condition of inability to meet one’s obligations. It is used in this sense in the well-known Bankruptcy Statute, 1621, c. 18, which deals with alienations “made by dyvours and bankrupts” after the contracting of lawful debts. This use of the term is not now common. It is more commonly and more appropriately used to denote (2) *notour bankruptcy*, a state of insolvency which has attained publicity, as evidenced by definite statutory *indicia*. This condition of insolvency is attended with important statutory effects in restraining the debtor’s power of dealing with his property, and in restricting his creditors’ rights of securing preferences by diligence, and it further renders the debtor liable to divestiture of his estate for distribution among his creditors. The term Bankruptcy is now, however, most commonly employed to denote (3) the condition of a debtor’s affairs under a public bankruptcy process of sequestration, whereby he is divested of his estate for distribution among his creditors, according to their respective rights.

**238.** This vagueness of meaning is found not only in common parlance, but also in the use of the term by text writers,<sup>1</sup> and in public statutes and judicial decisions. The recent tendency to use the term as denoting judicial divestiture of the debtor accords with its use in English law. It is expressly so defined in various statutes.<sup>2</sup> When the term “bankruptcy” is used in a deed or contract, the general rule is that the intention of the parties, when that can be discovered from the deed, governs the construction. “But apart from such evidence of intention, it would seem to be a rule that, where the term ‘bankruptcy’ occurs by itself in a deed or written document, bankruptcy by divestiture of the debtor, and not simple insolvency or notour bankruptcy, must be taken as intended.”<sup>3</sup> Thus, in a contract of copartnery, a clause providing for dissolution upon the bankruptcy of a partner was held not to apply to the case of mere insolvency.<sup>4</sup>

## SECTION 2.—NOTOUR BANKRUPTCY.

SUBSECTION (1).—*Origin.*

**239.** Notour bankruptcy in modern law was introduced by the Act 1696, c. 5.<sup>5</sup> Prior to the passing of this Act, the tests and the

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GENERAL AUTHORITIES.—Bell, Com. ii. 192; Goudy on Bankruptcy, 4th ed., 63 *et seq.*; Wallace on Bankruptcy, 2nd ed., 27 *et seq.*; Murdoch on Bankruptcy, 5th ed., 9 *et seq.*

<sup>1</sup> See Ersk. ii. 12, 59.

<sup>2</sup> See, *e.g.*, the Bills of Exchange Act, 1882, and the Partnership Act, 1890.

<sup>3</sup> Goudy on Bankruptcy, 4th ed., 16.

<sup>4</sup> *Munro v. Cowan & Co.*, 8th June 1813, F.C.

<sup>5</sup> For a history of the Act, see Bell, Com. ii. 192.

legal consequences of public insolvency were not well defined, and the decisions on the cases which came before the Courts were more or less arbitrary in nature. The Act of 1696 prescribed certain definite tests of notour bankruptcy ; it introduced the principle of giving a retrospective operation to notour bankruptcy when constituted ; fixed the period of such constructive bankruptcy at sixty days ; and prohibited, as frauds upon creditors, certain kinds of alienations to creditors by way of preference granted by a debtor after the commencement of that period.

**240.** The provisions of the Act in question are as follows :—

“ Our Sovereign Lord considering that notwithstanding of the Acts of Parliament already made against fraudfull alienations by bankrupts in prejudice of their creditors yet their frauds and abuses are still very frequent Does therefor and for the better restraining and obviating thereof in time comeing with advice and consent of the Estates of Parliament statute and declare That for hereafter if any debtor under diligence by horning and caption at the instance of his creditor be either imprisoned or retire to the Abbay or any other privileged place or flee or abscond for his personall security or defend his person by force and be afterwards found by sentence of the Lords of Session to be insolvent shall be holden and repute on these three joint grounds viz. diligence by horning and caption and insolvencie joyned with one or other of the said alternatives of imprisonment or retireing or fleeing or absconding or forcible defending to be a nottour bankrupt and that from the time of his forsaid imprisonment retireing fleeing absconding or forcible defending Which being found by sentence by the Lords of Session at the instance of any of his just creditors who are hereby empowered to raise and prosecute a declarator of bankrupt thereanent His Majestie with consent of the Estates of Parliament Declares all and whatsoever voluntar dispositions assignations or other deeds which shall be found to be made or granted directly or indirectly be the forsaid dyvor or bankrupt either at or after his becomeing bankrupt or in the space of sixty dayes of befor in favors of any of his creditors either for their satisfaction or farther security in preference to other creditors to be voyd and null : Likeas it is declared that all dispositions heretable bonds or other heretable rights whereupon infetment may follow granted by the forsaid bankrupts shall only be reckoned as to this case of bankrupt to be of the date of the sasine lawfully taken thereon but prejudice to the validity of the said heretable rights as to all other effects as formerly.”

#### SUBSECTION (2).—*Later Legislation.*

**241.** As the tests of notour bankruptcy prescribed by this Act were inapplicable to debtors exempt from personal diligence or out of Scotland, provision was made by the Sequestration Act of 1783 for constituting it by means of diligence against an insolvent debtor's property ; and in the subsequent Sequestration Acts of 1793, of 1814, and 1839, these provisions were substantially repeated. By the Bankruptcy Act of

1856<sup>1</sup> these different modes of constituting notour bankruptcy were, with certain modifications, re-enacted, and other modes were introduced. The Debtors Act, 1880, which by s. 4 abolished imprisonment for debt (except in a few specified cases), introduced a new and simple mode of constituting notour bankruptcy.<sup>2</sup>

SUBSECTION (3).—*Existing Modes of Constituting Notour Bankruptcy.*

242. The Bankruptcy Act of 1856 and the Debtors Act of 1880 (with the exception of s. 4) were repealed by the Bankruptcy (Scotland) Act, 1913,<sup>3</sup> and the various modes in which notour bankruptcy may now be constituted are set forth in ss. 5 and 6 of that statute, and are applicable to all debtors.

(i) *Notour Bankruptcy of Individuals.*

243. "Notour bankruptcy shall be constituted by the following circumstances :—

" 1st. By sequestration, or by the issuing of an adjudication of bankruptcy or the granting of a receiving order in England or Ireland ; or

" 2nd. By insolvency, concurring—

(A)—(1) With a duly executed charge for payment, where a charge is necessary, followed by the expiry of the days of charge without payment ;

(2) Where a charge is not necessary, with the lapse without payment of the days which must elapse before poinding or imprisonment can follow on a decree or warrant for payment of a sum of money ;

(3) With a poinding or seizure of any of the debtors' moveables for non-payment of rates or taxes ;

(4) With a decree of adjudication of any part of his heritable estate for payment or in security ; or

(B) With sale of any effects belonging to the debtor under a sequestration for rent."<sup>4</sup>

(ii) *Notour Bankruptcy of Partnerships, Corporations, and other Companies.*

244. "Notour bankruptcy of a company shall be constituted either in any of the foregoing ways or by any of the partners being rendered notour bankrupt for a company debt."<sup>5</sup> The word "company," as used in the Bankruptcy Act, 1913, includes "bodies corporate, politic, or collegiate, and partnerships," and "partner of a company" includes "the members of such bodies."<sup>6</sup>

<sup>1</sup> 19 & 20 Vict. c. 79, s. 7.

<sup>3</sup> 3 & 4 Geo. V. c. 20.

<sup>5</sup> Bankruptcy Act, 1913, s. 6.

<sup>2</sup> 43 & 44 Vict. c. 34, s. 6.

<sup>4</sup> *Ibid.*, s. 5.

<sup>6</sup> *Ibid.*, s. 2.



**245.** As a partnership or private trading company has a *persona* distinct from its members, the company may be made notour bankrupt without any of the partners being insolvent or bankrupt.<sup>1</sup> Such a company may be made notour bankrupt either by diligence against the company, or by diligence against an individual partner for a company debt.<sup>2</sup> A charge may be given an individual partner for a company debt, although his name does not appear in the firm name.<sup>3</sup> Corporations or quasi-corporate companies, including companies registered under the Companies Acts, may be made bankrupt under the Bankruptcy Act of 1913.<sup>4</sup> In the case of corporate bodies and public companies, where there is no direct liability on the part of individual members for company obligations, notour bankruptcy cannot be constituted by diligence against any of the partners.<sup>5</sup> Railway companies, being exempt from ordinary diligence by Act of Parliament, do not appear capable of being rendered notour bankrupt.<sup>6</sup> Unincorporated associations, such as clubs, etc., which have no separate *persona*, cannot be made notour bankrupt, and recourse in such cases must be taken against individual members who are liable, or, in some cases, against those members of the association who are appointed to represent it.<sup>7</sup>

**246.** The insolvency of a debtor required by the statute is not absolute insolvency (in the sense of an ultimate insufficiency of assets), but practical insolvency in the sense of "present inability to pay a debt. It is no answer to say that if he were given time to realise he might meet the obligation."<sup>8</sup> When the other requisites of the statute are present, there is *prima facie* evidence of insolvency warranting application for sequestration.<sup>9</sup> This presumption of insolvency is only, however, a *presumptio juris*, and may be rebutted by proof of solvency adduced in a petition for sequestration, or a petition for recall of sequestration, or in an action to set aside a fraudulent preference under the Act 1696, c. 5, or in proceedings to have diligence equalised.<sup>10</sup>

**247.** The charge and the officer's execution must be unexceptionable

<sup>1</sup> Goudy on Bankruptcy, 2nd ed., 71. As to a dissolved company, see *Stewart & M'Donald v. Brown*, 1898, 25 R. 1042.

<sup>2</sup> Bankruptcy Act, 1913, s. 6; see *Mullen, Ltd. v. Campbell*, 1923, S.L.T. 497.

<sup>3</sup> *Selkrig v. Dunlop*, 1804, Hume, 277.

<sup>4</sup> Sec. 6; *Wotherspoon v. Mags. of Linlithgow*, 1863, 2 M. 348; *Clark v. Hinde, Milne & Co.*, 1884, 12 R. 347.

<sup>5</sup> Goudy on Bankruptcy, 4th ed., 66; *Grant v. Cunningham*, 1747, Mor. 1210; *Hogan v. Wilson*, 1853, 15 D. 417.

<sup>6</sup> 30 & 31 Vict. c. 126, s. 4; *Haldane v. Girvan and Portpatrick Junction Rly. Co.*, 1881, 8 R. 669.

<sup>7</sup> Mackay, Manual, 158-160.

<sup>8</sup> *M'Nab v. Clarke*, 1889, 16 R. 610; *Teenan's Tr. v. Teenan*, 1886, 13 R. 833; *Aitken v. Kyd*, 1890, 28 S.L.R. 115.

<sup>9</sup> *M'Nab v. Clarke*, *supra*; *Knowles v. Crooks*, 1865, 3 M. 457.

<sup>10</sup> *Fleming v. Yeaman*, 1883, 21 S.L.R. 164; 9 App. Ca. 966; *Aitken v. Kyd*, *supra*; *Teenan's Tr. v. Teenan*, *supra*; *Knowles v. Crooks*, *supra*; *Bell, Com. ii. 159, 286*; Goudy on Bankruptcy, 4th ed., 64.



in form and regularity.<sup>1</sup> The execution is the only competent evidence of the charge, and is probative.<sup>2</sup> It is necessary that the charge should be for a fixed sum, or at least for a sum that can be immediately ascertained by the debtor.<sup>3</sup> Where a charge is not necessary or competent, as under a decree *in foro* obtained in the Small Debt Court, where the debtor has been personally present, the extracted decree followed by the lapse of days intervening prior to execution without payment constitutes notour bankruptcy.<sup>4</sup>

### SECTION 3.—PERSONS LIABLE TO NOTOUR BANKRUPTCY.

**248.** The Bankruptcy Act of 1913 makes no limitation as to who may be made notour bankrupt, and accordingly every person who is liable for debt may be rendered notour bankrupt.

#### SUBSECTION (1).—*Married Women.*

**249.** By the common law of Scotland, married women could not, as a general rule, incur obligations without the consent of their husbands, but a number of exceptions were admitted to that rule.<sup>5</sup> Their powers were widened still further by various statutory provisions, and in particular by the Married Women's Property (Scotland) Acts, 1881 and 1920. By the Act of 1920 the husband's right of administration after the passing of the Act was wholly abolished,<sup>6</sup> and it was provided that a married woman shall be capable of entering into contracts and incurring obligations, and be capable of suing and being sued as if she were not married; and her husband shall not be liable in respect of any contract she may enter into or obligation she may incur on her own behalf.<sup>7</sup> Married women, accordingly, may now be made notour bankrupt by diligence in respect of debt incurred by them.<sup>8</sup>

#### SUBSECTION (2).—*Minors.*

**250.** A minor without curators has power to incur debts, and may be made notour bankrupt in respect of such debts.<sup>9</sup> But he has the right of challenge within the *quadriennium utile* on the ground of minority and lesion.<sup>10</sup> Where a minor has curators, the debts incurred by him without their consent are not binding on him, and afford no ground for notour bankruptcy against him; but there are important exceptions to this rule—as, *e.g.*, if the minor holds himself out as having no curators or as being of age; or if the debts incurred have been for necessaries

<sup>1</sup> Bell, Com. ii. 160; *Beattie v. M'Lellan*, 1844, 6 D. 1088; *Graham v. Bell*, 1875, 2 R. 972.

<sup>2</sup> Dickson on Evidence, ii. ss. 1262 *et seq.*

<sup>3</sup> Goudy on Bankruptcy, 4th ed., 65; see *M'Martin v. Forbes*, 1824, 3 S. 275.

<sup>4</sup> Small Debt Act, 1837, s. 13; *Shiell v. Mossman*, 1871, 10 M. 58.

<sup>5</sup> Goudy on Bankruptcy, 4th ed., 68–69.

<sup>6</sup> Sec. 1.

<sup>7</sup> Sec. 3 (1).

<sup>8</sup> Walton on Husband and Wife, 2nd ed., 164.

<sup>9</sup> Ersk. i. 7, 33.

<sup>10</sup> Ersk. i. 7, 34.

or *in rem versum* of him ; or if, being in trade, he has incurred trade debts.<sup>1</sup>

SUBSECTION (3).—*Pupils and Insane Persons.*

251. Pupils have no power to incur debt, but they may be made notour bankrupt in respect of debts validly contracted by their tutors or others on their behalf.<sup>2</sup> The same rule applies in the case of idiots and lunatics, who may be made notour bankrupt where debt has been lawfully incurred on their behalf. It is thought that lunatics may be made bankrupt in respect of debts incurred by them prior to their lunacy, or during a lucid interval.<sup>3</sup>

SUBSECTION (4).—*Peers and Members of Parliament.*

252. Peers were exempted from personal diligence, and a similar immunity was enjoyed by Members of the House of Commons during the sitting of Parliament and for forty days before and after its meeting.<sup>4</sup> But both classes became subject to notour bankruptcy under the alternatives introduced by the sequestration statutes, and under the existing Bankruptcy Act of 1913<sup>5</sup> they may be made bankrupt in the same way as ordinary debtors.

SUBSECTION (5).—*Aliens and Persons Abroad.*

253. Persons resident abroad, whether foreigners or natives, may be made notour bankrupt if they are subject to the jurisdiction of the Scottish Courts in respect of ownership of heritable property in this country, or of residence for forty days, or of carrying on business in this country.<sup>6</sup> It is doubtful whether jurisdiction founded on arrestment is sufficient to enable notour bankruptcy to be constituted.<sup>7</sup>

SUBSECTION (6).—*Undischarged Bankrupts.*

254. It was at one time held that a person who had once been made notour bankrupt could not again be rendered bankrupt unless he had become solvent or had been discharged, but that has ceased to be the case. The matter is now regulated by the Bankruptcy Act, 1913, which provides that notour bankruptcy, when it has once been constituted, shall continue in the case of a sequestration till the debtor shall obtain his discharge, and in other cases until insolvency cease, without prejudice to notour bankruptcy being anew constituted within such period or

<sup>1</sup> Goudy on Bankruptcy, 4th ed., 71.

<sup>2</sup> 1696, c. 41 ; Bell, Com. ii. 157 ; Ersk. iv. 3, 25.

<sup>3</sup> Ersk. i. 7, 51 ; Goudy on Bankruptcy, 4th ed., 71.

<sup>4</sup> Bell, Com. ii. 460.

<sup>5</sup> Sec. 5.

<sup>6</sup> *Pedie v. Grant*, 1822, 1 S. 495, revd. (H.L.) 1825, 1 W. & S. 716 ; *Smyth v. Ninian*, 1826, 5 S. 8 ; *Joel v. Gill*, 1859, 21 D. 929 ; *Fraser v. Fraser*, 1870, 8 M. 400 ; Mackay, Manual, 53 *et seq.*

<sup>7</sup> *Croil, Petr.*, 1863, 1 M. 509 ; see *Goetze v. Aders*, 1874, 2 R. 150.

after the expiry thereof.<sup>1</sup> This rule that notour bankruptcy may be constituted anew against persons already in a state of bankruptcy was held not to apply to equalisation of diligences,<sup>2</sup> but that does apply now, as the Bankruptcy Act, 1913, further provides that any second or subsequent constitution of notour bankruptcy shall be available for all the purposes of s. 10 of the Act, as well as for the purpose of applying for sequestration.<sup>1</sup>

#### SECTION 4.—COMMENCEMENT AND ENDURANCE OF NOTOUR BANKRUPTCY.

##### SUBSECTION (1).—*Commencement.*

**255.** The Bankruptcy Act, 1913, enacts that “notour bankruptcy shall be held to commence from the time when its several requisites concur.”<sup>1</sup> Where it is constituted by sequestration it commences from the date of the first deliverance;<sup>3</sup> and in the case of an English or Irish adjudication of bankruptcy, or receiving order, from the date thereof. Suspension of diligence after notour bankruptcy has been constituted does not affect the operation of the bankruptcy; but where suspension occurs at an earlier stage, notour bankruptcy will not commence until the diligence is completed.<sup>4</sup> Where a charge for payment upon a decree in absence obtained in the Sheriff Court was allowed to expire without payment, an application for sequestration of the debtor’s estates was made by the creditor, but before the application was disposed of the decree in absence was recalled, and the Court held that sequestration was properly refused in respect that the statutory requisites were not present.<sup>5</sup> The commencement of the period of sixty days of constructive bankruptcy under the Act 1696, c. 5, is dealt with later.

##### SUBSECTION (2).—*Endurance.*

**256.** With regard to the endurance of notour bankruptcy when once constituted, the Bankruptcy Act, 1913, enacts that it shall continue “in the case of a sequestration until the debtor shall obtain his discharge, and in other cases until insolvency cease, without prejudice to notour bankruptcy being anew constituted within such period or after the expiry thereof.”<sup>6</sup> The proof of insolvency having ceased may be by evidence of payment of debts, or of the creditors having accepted a composition, or of the debtor having obtained a discharge of his debts under a trust deed. Notour bankruptcy does not cease by reason that

<sup>1</sup> Bankruptcy Act, 1913, s. 7.

<sup>2</sup> *Wood v. Cranston & Elliot*, 1891, 18 R. 382; *Blair v. North British and Mercantile Insur. Co.*, 1889, 16 R. 947, *affd.* 17 R. (H.L.) 76.

<sup>3</sup> Bankruptcy Act, 1913, s. 41.

<sup>4</sup> *Sutherland v. Sutherland*, 1843, 5 D. 544; *Fleming v. Yeaman*, 1883, 21 S.L.R. 164; 9 App. Ca. 966; *National Bank of Scotland v. Johnston*, 1842, 5 D. 205; Bell, Com. ii. 166; *Laird v. Scott*, 1913, 2 S.L.T. 409.

<sup>5</sup> *Arrol & Sons v. Christie*, 1901, 4 F. 262.

<sup>6</sup> Bankruptcy Act, 1913, s. 7.

the debtor has entered into an arrangement with his creditors for payment of their claims by instalments over an extended period of time, as in the event of failure to pay an instalment, the original debt revives.<sup>1</sup>

257. In order that notour bankruptcy may be made the ground of an application for sequestration by a creditor, it must have been constituted within four months prior to the presentation of the petition, and the state of notour bankruptcy must exist when the petition is presented.<sup>2</sup> Similarly for the purpose of equalising diligences by arrestment and poinding, the effect of the notour bankruptcy is limited to four months after the date of constitution.<sup>3</sup> The Act, however, provides that any second or subsequent constitution of notour bankruptcy shall be available for all the purposes enumerated in s. 10, as well as for the purpose of applying for sequestration.<sup>4</sup>

258. For the purpose of challenging transactions under the Act 1696, c. 5, the effects of notour bankruptcy continue until the debtor regains solvency.<sup>5</sup> When notour bankruptcy has once been duly constituted, any creditor is entitled to take advantage of it, although the creditor who used the diligence afterwards abandons it.<sup>6</sup> "After a person has been legally rendered bankrupt by proceedings at the instance of one creditor, the bankruptcy forms a *jus quæsitum* to all his creditors, which cannot be removed either by a transaction between the bankrupt and the creditor who uses the diligence, or by the judgment of a Court in which they alone are parties."<sup>7</sup> Thus, where an execution of search was reduced at the instance of the trustee under a trust deed granted by the bankrupt within sixty days previously, it was held competent for a creditor, notwithstanding, to found on it as evidence of notour bankruptcy in an action to reduce the trust deed.<sup>7</sup>

## SECTION 5.—EFFECTS OF NOTOUR BANKRUPTCY.

### SUBSECTION (1).—*Equalising Arrestments and Poindings.*

#### (i) *Pari passu ranking.*

259. The Act 1696, c. 5, while placing restraint on a bankrupt's power of dealing with his estate, contained no provision affecting the right of creditors to acquire preferences by diligence. Provisions on the subject were, however, made by the Sequestration Act of 1772 and the subsequent Sequestration Acts. The existing enactment is contained in the 10th section of the Bankruptcy Act, 1913, which provides that "arrestments and poindings which shall have been used within sixty days prior to the constitution of notour bankruptcy, or within four

<sup>1</sup> *Neil's Tr. v. British Linen Bank*, 1898, 36 S.L.R. 139.

<sup>2</sup> Bankruptcy Act, 1913, ss. 11 and 13.

<sup>3</sup> *Ibid.*, s. 10.

<sup>4</sup> *Ibid.*, s. 7.

<sup>5</sup> *Mackellar's Crs. v. Macmath*, 1791, Mor. 1114; Bell, Com. ii. 169.

<sup>6</sup> *Mackellar's Crs. v. Macmath*, *supra*.

<sup>7</sup> *M'Hardy v. Adam*, 1833, 11 S. 735, per Lord Corehouse.



months thereafter, shall be ranked *pari passu* as if they had all been used of the same date." The application of this section extends to companies registered under the Companies Acts where they are rendered notour bankrupt.<sup>1</sup> The *pari passu* ranking is not merely of arrestments with arrestments and poindings with poindings, but operates to equalise all diligences of either class.

(ii) *Computation of Time.*

**260.** The statutory period falls to be computed according to the rule in the 3rd section of the 1913 Act, which provides that "periods of time in this Act shall be reckoned exclusive of the day from which such period is directed to run." In order, therefore, that an arrestment or poinding may be saved from the operation of the 10th section, sixty free days must have elapsed exclusive of the day on which notour bankruptcy is constituted. Thus, if the date of notour bankruptcy be the 30th June, all arrestments and poindings executed during that or the preceding month will rank *pari passu*, while diligence executed on 30th April will have a preference.<sup>2</sup>

(iii) *Sequestration as an Equalising Diligence.*

**261.** By s. 104 of the Bankruptcy Act, 1913, it is declared that the "sequestration shall, as at the date thereof, be equivalent to an arrestment in execution and decree of furthcoming, and to an executed or completed poinding; and no arrestment or poinding executed of the funds or effects of the bankrupt, on or after the sixtieth day prior to the sequestration, shall be effectual." Where arrestments or poindings are executed more than sixty days prior to sequestration, and are therefore not rendered ineffectual by the above provision, the question arises whether the sequestration, if supervening within four months of notour bankruptcy, is, by virtue of its operation as an arrestment and poinding, entitled to rank *pari passu* with all such diligences as have been executed not earlier than sixty days prior to the notour bankruptcy, with the result of preventing any preference over the general body of creditors being created by such diligences. On a construction of the 10th and 104th sections, the sequestration would seem to have this equalising effect.<sup>3</sup>

**262.** In order to obtain the benefit of the *pari passu* ranking within the statutory period, it is not essential that diligence be actually executed, it being provided that "any creditor judicially producing, in a process relative to the subject of such arrestment or poinding, liquid grounds of debt or decree of payment within such period, shall be

<sup>1</sup> *Clark v. Hinde, Milne & Co.*, 1884, 12 R. 347.

<sup>2</sup> Goudy on Bankruptcy, 4th ed., 75, 107; *Scott v. Rutherford*, 1839, 2 D. 206; *Stiven v. Reynolds & Co.*, 1891, 18 R. 422; *Wilson*, 1891, 19 R. 219; Kinnear on Bankruptcy, 8.

<sup>3</sup> See per Lord Deas in *Wyper v. Harveys*, 1861, 23 D. 606 at 628, and in *Nicolson v. Johnstone & Wright*, 1872, 11 M. 179; *Mitchell v. Scott*, 1881, 8 R. 875; *Galbraith v. Campbell's Trs.*, 1885, 22 S.L.R. 602.

entitled to rank as if he had executed an arrestment or a pouncing.”<sup>1</sup> The process in which production is made may be one of furthcoming, or pouncing and sale, or multiplepouncing.<sup>2</sup> Arrestments used on the dependence of an action, or in respect of an illiquid debt within the statutory period, must “be followed up without undue delay.”<sup>3</sup> If the creditor unduly delays in proceeding to obtain decree, he will be barred from sharing in the subject attached or its proceeds.<sup>4</sup> Undue delay is a question of circumstances.<sup>5</sup>

(iv) *Creditors recovering Payment Accountable.*

263. Provision is also made by s. 10 for the case of an arresting or pouncing creditor completing his diligence by furthcoming or sale within the statutory period, before other creditors have done diligence or judicially asserted their right to a *pari passu* ranking. It is thereby enacted that “in case the first or any subsequent arrester shall in the meantime obtain a decree of furthcoming and preference, and thereupon shall recover payment, or a pouncing creditor shall carry through a sale, he shall be accountable for the sum recovered to those who, by virtue of this Act, may be eventually found to have a right to a *pari passu* ranking thereon, and shall be liable to an action at their instance for payment to them proportionally, after allowing out of the fund the expense of recovering the same.”<sup>6</sup> A pouncing or arresting creditor who recovers payment of his whole debt, but is obliged to admit other creditors to an equal participation with him under this provision, is entitled to do diligence anew for the balance of his debt.<sup>7</sup>

(v) *Arrestments after Four Months.*

264. With regard to arrestments used for attaching the same effects more than four months subsequent to the constitution of notour bankruptcy, it is provided that they shall not compete with those used within the sixty days or four months, “but may rank with each other on any reversion of the fund attached, according to law and practice.”<sup>8</sup> No similar provision is made regarding poundings after the four months, but an opinion has been expressed that they are included by implication within the scope of the clause quoted.<sup>9</sup> It was held in one case, that for the purpose of equalising diligence, s. 12 of the statute of 1856 contemplates one constitution of

<sup>1</sup> Bankruptcy Act, 1913, s. 10.

<sup>2</sup> *Sangster v. Burness*, 1857, 20 D. 355; *Clark v. Hinde, Milne & Co.*, 1884, 12 R. 347; Bell, Com. ii. 75.

<sup>3</sup> Bankruptcy Act, 1913, s. 10.

<sup>4</sup> *Mitchell v. Scott*, 1881, 8 R. 875; *Liqrs. Benhar Coal Co. v. Turnbull*, 1883, 10 R. 558.

<sup>5</sup> *Mitchell v. Scott*, *supra*.

<sup>6</sup> Bankruptcy Act, 1913, s. 10. As to form of action, see *Dobbie v. Nisbet*, 1854, 16 D. 381; *Bald v. Gibb & Bruce*, 1859, 21 D. 473; *Wood v. Cranston & Elliot*, 1891, 18 R. 382.

<sup>7</sup> *Gallacher v. Ballantine*, 1876, 13 S.L.R. 496.

<sup>8</sup> Bankruptcy Act, 1913, s. 10.

<sup>9</sup> Goudy on Bankruptcy, 4th ed., 110, note (a).

notour bankruptcy only. The debtor had there been rendered notour bankrupt by the expiry of a charge without payment, and the creditor thereafter carried through a pouncing and sale. Another creditor claimed to be ranked *pari passu* on the proceeds of the sale, within four months of the pouncing, but more than four months from the original constitution of notour bankruptcy, contending that by the pouncing notour bankruptcy had been constituted anew to the effect of giving a *pari passu* ranking to creditors compearing within four months thereof. The Court negatived this view, holding that the provision in s. 9 of the Act as to constituting notour bankruptcy anew was only for the purpose of creating a foundation for sequestration.<sup>1</sup> But s. 7 of the Bankruptcy Act of 1913 expressly provides that “any second or subsequent constitution of notour bankruptcy shall be available for all the purposes of s. 10 of this Act” (which corresponds to s. 12 of the Act of 1856) as well as for the purpose of applying for sequestration of a debtor’s estates. This provision would seem to allow of such subsequent diligence being in this way equalised.<sup>2</sup>

#### SUBSECTION (2).—*Subjecting Debtor to Sequestration.*

**265.** By s. 11 of the Act of 1913, any debtor subject to the jurisdiction of the Supreme Courts of Scotland, whether an individual or a company, who has been made notour bankrupt, is liable to sequestration without his consent, provided certain conditions as to having a residence or place of business in Scotland within a year before the date of the petition are fulfilled. The petition for sequestration must, however, be presented within four months of the notour bankruptcy, but for this purpose it may be constituted anew.<sup>3</sup>

#### SECTION 6.—CHALLENGE OF PREFERENCES TO CREDITORS UNDER THE ACT 1696, c. 5.

##### SUBSECTION (1).—*No Preference within Sixty Days.*

**266.** As already mentioned, this statute, in addition to introducing certain tests of notour bankruptcy, declares that all and whatsoever voluntary dispositions, assignations, or other deeds which shall be found to be made and granted, directly or indirectly, by the dyvour or bankrupt, either at or after his becoming bankrupt, or in the space of sixty days before in favour of any of his creditors, either for their satisfaction or further security, in preference to other creditors, shall be void and null. The period of sixty days is computed according to the common-law rule, which differs from the rule under the Bankruptcy Act, 1913.<sup>4</sup> “Either the day of bankruptcy (counting from it)

<sup>1</sup> *Wood v. Cranston & Elliot*, 1891, 18 R. 382.

<sup>2</sup> Bankruptcy Act, 1913, ss. 7, 10; Goudy on Bankruptcy, 4th ed., 110; Wallace on Bankruptcy, 2nd ed., 35-36.

<sup>3</sup> Bankruptcy Act, 1913, ss. 7, 11, 13.

<sup>4</sup> See *supra*.



is not reckoned, or the day of giving the preference (counting from it); but in either case, in conformity with the maxim, *dies inceptus pro completo habetur*, the sixty days are held to have expired the moment the sixtieth day is begun.”<sup>1</sup> Thus, where notour bankruptcy was constituted on May 30, an indorsement of a bill made on March 31 was held beyond the sixty days, and not subject to challenge.<sup>2</sup> With regard to deeds requiring sasine or other proceeding for their completion, the provision of the statute as altered by subsequent Acts is now superseded by that contained in s. 4 of the Bankruptcy Act, 1913, which declares that the date of a deed under that Act, or under the Act 1696, c. 5, shall be “the date of the registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall, in the particular case, be requisite for rendering such deed completely effectual.”<sup>3</sup>

#### SUBSECTION (2).—*Constructive Fraud.*

267. Although the Act of 1696 is directed against “fraudfull alienations,” it is not necessary, in challenging transactions under it, to prove actual *animus fraudandi* on the part of the bankrupt.<sup>4</sup> Even proof of intention to give a preference, or of contemplation of bankruptcy by the debtor at the time, does not seem essential.<sup>4</sup> Nor is it necessary to prove that the creditor receiving the preference acted collusively.<sup>5</sup> It is not settled, however, whether the rule of the statute is absolute to the effect of voiding all transactions within its scope which operate *de facto* as preferences, irrespective of the question of *bona fides* on the part of granter and grantee.<sup>6</sup> Proof of fraud or collusion will be necessary where the parties conspire to create a preference under the guise of a transaction which does not *prima facie* fall under the Act, such as a transaction ostensibly in the ordinary course of trade.<sup>7</sup>

#### SUBSECTION (3).—*Transactions struck at.*

268. Subject to what is said below as to the classes of transactions which are recognised as outwith the statutory rule, it may be stated that the scope of the Act is not in any way limited by the form in which the preference is given. The Act has been construed so as to include every kind of transaction by which a preference can be conferred on a creditor, whether by direct transfer or by some indirect operation. The

<sup>1</sup> Goudy on Bankruptcy, 4th ed., 75.

<sup>2</sup> *Blaikie v. Clegg*, 21st Jan. 1809, F.C.

<sup>3</sup> Bankruptcy Act, 1913, s. 4; see Bell, Com. ii. 213–16. As to questions under earlier law, see Goudy on Bankruptcy, 4th ed., 98–99.

<sup>4</sup> *Blincoe's Tr. v. Allan*, 1828, 7 S. 124; *Matthew's Tr. v. Matthew*, 1867, 5 M. 961, per L. P. Inglis; *Loudon v. Reid & Lauder's Tr.*, 1877, 5 R. 293, per Lord Shand; *Marshall's Tr. v. Provan*, 1794, Mor. 1144.

<sup>5</sup> *Blincoe's Tr. v. Allan*, *supra*, and 1833, 7 W. & S. 26; *Scougall v. White*, 1828, 6 S. 494.

<sup>6</sup> *Loudon v. Reid & Lauder's Tr.*, *supra*; *M'Dougall's Tr. v. Gibbon*, 1889, 16 R. 740, per Lord Young.

<sup>7</sup> Goudy on Bankruptcy, 4th ed., 81–82.



following instances are given by way of illustration of preferences which have been held as struck at by the Act, viz. the indorsation of a bill or cheque,<sup>1</sup> the discharge of a debt ;<sup>2</sup> the renunciation of a right, such as the cancellation of a back-bond qualifying an absolute disposition,<sup>3</sup> the granting or renunciation of a lease ;<sup>4</sup> a mortgage of a ship ;<sup>5</sup> abandonment of a competent defence to an action ;<sup>6</sup> prepayment of a debt ;<sup>7</sup> selling property to a third party on agreement for handing the price to the favoured creditor ;<sup>8</sup> selling goods to a creditor in order that he may plead compensation on the price ;<sup>9</sup> granting security to a third party who arranges to undertake liability as cautioner for the favoured creditor's debt ;<sup>10</sup> granting a disposition in security of heritable subjects, the creditor allowing the bankrupt to realise the subjects and agreeing to discharge the bond, on condition that the price was handed to him ;<sup>11</sup> a conveyance of property made in fulfilment of a promise to give security over other property for a past loan ;<sup>12</sup> granting an antedated receipt as a payment towards "any displenishing sale" by a farmer to a firm of auctioneers who had made him an unsecured advance and who were employed to carry through the sale ;<sup>13</sup> and granting a letter to an auctioneer undertaking to pay him for behoof of the landlord the price of certain crops sold by auction.<sup>14</sup> But it is not a *pactum illicitum* for a bankrupt, who has obtained the consent of his creditors to a composition contract, to assign valuable rights to a particular creditor in return for money advanced to pay the composition.<sup>15</sup> A trust deed for creditors may be reduced by any non-acceding creditor.<sup>16</sup>

**269.** To render a transaction liable to challenge under the Act, it must be granted to a creditor in an existing debt. Thus gratuitous alienations to third parties, although liable to challenge at common law or under the Act 1621, c. 18, do not fall within the Act of 1696, which only strikes at acts by the bankrupt "in favours of any of his creditors either for their satisfaction or farder security in preference to

<sup>1</sup> *Nicol v. M'Intyre*, 1882, 9 R. 1097 ; *Carter v. Johnstone*, 1886, 13 R. 698.

<sup>2</sup> *Renton & Gray's Tr. v. Dickison*, 1880, 7 R. 951.

<sup>3</sup> *Bell, Com. ii.* 197 ; *Keith v. Maxwell*, 1795, Mor. 1163.

<sup>4</sup> *Morrison v. Carron Co.*, 1854, 16 D. 1125 ; *Gorrie's Tr. v. Gorrie*, 1890, 17 R. 1051.

<sup>5</sup> *Anderson v. Western Bank*, 1859, 21 D. 230.

<sup>6</sup> *Wilson v. Drummond's Reps.*, 1853, 16 D. 275 ; *Laurie's Tr. v. Beveridge*, 1867, 6 M. 85.

<sup>7</sup> *Speir v. Dunlop*, 1825, 4 S. 92 ; 1827, 5 S. 729 ; *Blinchow's Tr. v. Allan*, 1828, 7 S. 124 and 753 ; *affd.* 1833, 7 W. & S. 26 ; *Rose v. Falconer*, 1868, 6 M. 960.

<sup>8</sup> *Barbour v. Johnstone*, 1823, 2 S. 351 ; *Ramsay v. Scales' Reps.*, 1829, 7 S. 749.

<sup>9</sup> *Bell, Com. ii.* 199 ; *Marshall's Tr. v. Provan*, 1794, Mor. 1144.

<sup>10</sup> *Miller v. Low*, 1822, 2 S. 77 ; *affd.* 1827, 2 W. & S. 579.

<sup>11</sup> *Neil's Tr. v. British Linen Bank*, 1898, 36 S.L.R. 139.

<sup>12</sup> *Hill's Trs. v. Macgregor*, 1901, 8 S.L.T. 484.

<sup>13</sup> *Dods v. Welsh*, 1904, 12 S.L.T. 110.

<sup>14</sup> *Craig's Tr. v. Macdonald, Fraser & Co.*, 1902, 4 F. 1132 ; *see Allan v. Jones & Co.'s Tr.*, 1901, 39 S.L.R. 263.

<sup>15</sup> *Hay v. Rafferty*, 1899, 2 F. 302.

<sup>16</sup> *Douglas v. Gibson-Craig*, 1832, 10 S. 647 ; *Wright v. Walker*, 1839, 1 D. 641 ; *Mackenzie v. Calder*, 1868, 6 M. 833.

other creditors.”<sup>1</sup> But it will not render a transaction exempt that a third party is interposed as the direct grantee in order to disguise the real nature of the transaction.<sup>2</sup>

270. The transaction challenged must be granted voluntarily and in satisfaction or further security. It may be now taken as the rule of construction developed by a long course of decisions, that the Act is intended to strike at transactions by which favoured creditors are given, not specific implement of a matured debt, but some *surrogatum* or security therefor. In the leading case of *Taylor v. Farrie*<sup>3</sup> the following *dictum* was concurred in by the whole Court:—“We think that by that statute the Legislature did not intend to disable persons in the predicament therein set forth from fairly paying their debts as these became payable—or from fairly and strictly performing their obligations *ad factum præstandum* as these became prestable. It is legally necessary for such obligants so to pay their debts and to perform their obligations; and it was not the object of the statute to disable them from doing without compulsion what the law itself would compel them to do. What the Legislature intended by the statute was to disable a debtor who is in the predicament therein set forth and unable to pay his debts, from entering spontaneously into some new transaction with a favoured creditor, whereby, in lieu of—or as a substitute for—regular payment of a debt in cash, the debtor grants and the creditor receives a transference of some other funds or effects forming part of the debtor’s estate.”<sup>4</sup>

271. A mere voucher given by the debtor for an existing debt, which only enables the creditor to obtain an ordinary ranking on the debtor’s estate, is not struck at.<sup>5</sup> But where a bill acceptance was given and was used by a creditor for obtaining a preference by competing in a poiding, it was held liable to challenge.<sup>6</sup> And a bond of corroboration, accumulating interest and penalties and putting the creditor in a position to adjudge, was also set aside.<sup>7</sup>

272. It will not exempt a deed from challenge under the Act, that it has been granted by a person resident and domiciled in England,<sup>8</sup> or outwith Scotland;<sup>9</sup> nor that the preferred creditor is a foreigner resident out of the jurisdiction.<sup>10</sup>

<sup>1</sup> *M'Dougall's Tr. v. Gibbon*, 1889, 16 R. 740; *Hamilton's Crs. v. Henry's Reps.*, 1743, Mor. 1092; *Ferguson, etc. v. Welsh*, 1869, 7 M. 592.

<sup>2</sup> *Barbour v. Johnstone*, 1823, 2 S. 351; *Ramsay v. Scales' Reps.*, 1829, 7 S. 749; see *Nova debita*, *infra*, para. 283 *et seq.*

<sup>3</sup> 1855, 17 D. 639.

<sup>4</sup> See also *Gibson v. Forbes*, 1833, 11 S. 916 at 929, per Lord Fullerton; *Stiven v. Scott & Simson*, 1871, 9 M. 923, per L. P. Inglis.

<sup>5</sup> *Matthew's Tr. v. Matthew*, 1867, 5 M. 957; *Williamson v. Allan*, 1882, 9 R. 859.

<sup>6</sup> *Strang v. M'Intosh*, 1821, 1 S. 1; see L. P. Inglis in *Matthew's Tr. v. Matthew*, *supra*.

<sup>7</sup> *Mackellar's Crs. v. Macmath*, 1791, Mor. 1114.

<sup>8</sup> *Blackburn*, 22nd Feb. 1810, F.C.

<sup>9</sup> *Sym v. Thomson*, 1758, Mor. 1137.

<sup>10</sup> *White v. Briggs*, 1843, 5 D. 1148; *Hunter v. Palmer*, 1825, 3 S. 586.

SUBSECTION (4).—*Transactions Exempt from Challenge.*

273. The rule of construction laid down in *Taylor's* case is illustrated by the various kinds of transactions which have come to be recognised as beyond the scope of the Act, although taking place within the statutory period. These are usually classed under the following heads—although the classification does not correspond to any definite distinctions in the principles governing the different classes—viz.: 1. Cash payments. 2. Transactions in the ordinary course of trade. 3. *Nova debita*.

(i) *Cash Payments.*

274. Payment in cash of money obligations presently due has always been regarded as outwith the scope of the Act.<sup>1</sup> Such payment is neither “satisfaction” nor “farder security” in the sense of the Act, according to the rule of construction already mentioned, but is specific implement of the obligation according to its terms.<sup>2</sup> “A man, though he knows that he is insolvent and cannot pay all his creditors, may nevertheless prefer any of them whom he pleases, and pay their debts in full, provided their debts are due, and due in actual money. He is at liberty to do this, though he is not at liberty to give them any pledge in security of their debts.”<sup>3</sup>

275. The payment must be *bona fide*, and in the ordinary course of business. If the payment be anticipatory and not on account of a matured debt, it will, in the general case, fall within the Act as being “satisfaction or farder security.”<sup>4</sup> It has, however, been said that “when a party has money in his hands for which he has no immediate use, he may perhaps purchase up his own bill before it becomes due.”<sup>5</sup> And the course of dealing between the parties, or custom of trade, may form relevant considerations in determining whether a prepayment is, in particular circumstances, struck at by the Act.<sup>6</sup> Collusive transactions, as where the parties conspire to convert the debtor's property into cash available for the creditor's payment, will not be protected from challenge.<sup>7</sup> It is not in itself enough, however, that the debtor has paid the money with the intention of preferring the creditor in question, even though he has sold part of his property in order to

<sup>1</sup> *Forbes v. Brebner*, 1751, Mor. 1128; *Ramsay v. Scales' Reps.*, 1829, 7 S. 749; *Gordon v. Brock*, 1838, 1 D. 1; *Pringle's Tr. v. Wright*, 1903, 5 F. 522.

<sup>2</sup> *Bell*, Com. ii. 201; *Gibson v. Forbes*, 1833, 11 S. 930, per Lord Fullerton.

<sup>3</sup> *Coutts' Tr. v. Doe & Webster*, 1886, 13 R. 1112, per Lord Young.

<sup>4</sup> *Speir v. Dunlop*, 1825, 4 S. 92; 1826, 2 W. & S. 253; 1827, 5 S. 729; *Blincoe's Tr. v. Allan & Co.*, 1828, 7 S. 124 and 753; 1833, 7 W. & S. 26; *Rose v. Falconer*, 1868, 6 M. 960; see *Guild v. Orr Ewing & Co.*, 1857, 20 D. 3 and 392; *Angus' Tr. v. Angus*, 1901, 4 F. 181.

<sup>5</sup> *Speir v. Dunlop*, *supra*, per Lord Glenlee.

<sup>6</sup> *Guild v. Orr Ewing & Co.*, *supra*, per L. P. McNeill.

<sup>7</sup> *Bean v. Strachan*, 1760, Mor. 907; *Mitchell v. Rodger*, 1834, 12 S. 802; *Shaw's Tr. v. Stewart & Bisset*, 1887, 15 R. 32; see *Neil's Tr. v. British Linen Bank*, 1898, 36 S.L.R. 139; *Craig's Tr. v. Macdonald, Fraser & Co.*, 1902, 4 F. 1132.



obtain the cash to do so ; nor that the creditor knew the debtor to be insolvent when he received payment.<sup>1</sup>

276. The benefit of the present exception extends to payments made by bank notes, cheques by the debtor (as distinguished from indorsements),<sup>2</sup> bank drafts and bills, Exchequer and Navy bills, and other mercantile paper which is commonly paid and received as cash.<sup>3</sup> The order upon a person, who undertook to provide the bankrupt with loans and to act in that way as his banker, to pay a sum in payment of a debt instantly prestable, was held to be a cash payment in the ordinary course of business.<sup>4</sup> But payments by bill or indorsement of cheques are not protected,<sup>5</sup> unless made in the ordinary course of trade,<sup>6</sup> or perhaps where the creditor resides abroad, and the means of remittance are therefore restricted.<sup>7</sup> Consignation of money is in certain cases equivalent to payment, so as to entitle the creditor to receive the consigned money though the debtor has become notour bankrupt within sixty days of the consignation.<sup>8</sup> But the mere setting apart or separating the money for the creditor's use in the debtor's hands, without actual delivery thereof, will not in the ordinary case be regarded as equivalent to payment in a question under the Act.<sup>9</sup>

(ii) *Transactions in the Ordinary Course of Trade.*

277. To deny this exception would lead to the disturbance of business relations in a way not intended by the statute. During the statutory period the imminence of notour bankruptcy may be unsuspected, while the prospect of its occurrence can never be a certainty ; and were all business transactions within that period to be struck at upon its occurrence, the result would be to paralyse trade. The continuance of ordinary business dealings, moreover, cannot be regarded as containing the ingredient proscribed by the Act, which is the taking of extraordinary measures to satisfy creditors whose claims cannot be met by the debtor in ordinary course. The distinction may be illustrated by the following case :—A manufacturer who held bills granted by customers, indorsed these over to a creditor in payment of the latter's claim. The transaction was defended as being in accordance with the bankrupt's own business practice, followed during several years ; but this practice was itself

<sup>1</sup> *Coutts' Tr. v. Doe & Webster*, 1886, 13 R. 1112 ; *Pringle's Tr. v. Wright*, 1903, 5 F. 522, per Lord Kyllachy.

<sup>2</sup> *Carter v. Johnstone*, 1886, 13 R. 698.

<sup>3</sup> Bell, Com. ii. 202 ; *Blinco's Tr. v. Allan & Co.*, 1828, 7 S. 124 ; *Dixon v. Cowan*, 1828, 7 S. 132 ; *Carter v. Johnstone*, *supra*.

<sup>4</sup> *Craig v. Hunter & Son*, 1905, 13 S.L.T. 525 (O.H.).

<sup>5</sup> *Carter v. Johnstone*, *supra* ; *Richmond v. United Collieries Co.*, 1905, 12 S.L.T. 741.

<sup>6</sup> See *infra*.

<sup>7</sup> See Lord Shand in *Carter v. Johnstone*, *supra*.

<sup>8</sup> *Guild v. Orr Ewing & Co.*, 1857, 20 D. 3 and 392 ; *Stiven v. Reynolds & Co.*, 1891, 18 R. 422 ; *Gordon v. Brock*, 1838, 1 D. 1 ; *Mitchell v. Rodger*, 1834, 12 S. 802.

<sup>9</sup> Bell, Com. ii. 202 ; see *Macintosh v. Brierly*, 1846, 5 Bell's App. 1.



the outcome of his financial stringency ; and the indorsation of the bills was held to be out of the ordinary course of business dealing.<sup>1</sup> It was remarked : “ The ordinary course of business in the case of a trader who is in a state of solvency, would have been that every one of these bills should have been lodged with his banker and placed to his credit, and when he paid his creditors he would have paid them by cheque on his banker. That would have been the ordinary course of business ; this is an extraordinary course of business, and only resorted to because the bankrupt was in labouring circumstances.”<sup>2</sup>

**278.** It is not possible to lay down precise categories for the transactions falling under the present exception, as much will often depend on the circumstances of the case, such as the nature of the particular business in which the transactions arise. Deliveries of goods in implement of prior contracts in ordinary course are not affected by the Act, even although a long period may have intervened.<sup>3</sup> A transaction may be protected under this exception although it has the effect of incidentally conferring a preference on a creditor for a prior debt. Thus, where a bleacher in ordinary course received within the sixty days goods to bleach from a manufacturer who was due him an account for work already done, it was held that the bleacher’s lien fell to be allowed its full effect, with the result that he thereby obtained a security over the goods sent not only for the cost of the work done upon them, but for the prior account.<sup>4</sup> Similarly, the consignment of goods to a factor in ordinary course is legitimate, although he may thereby obtain security under his right of lien for an existing balance due by the principal. But it would, of course, be otherwise if the real object of the consignment were to create such security.<sup>5</sup> If the factor, on the other hand, be due his principal the value of goods sold on his behalf, and consign to the latter goods against such value, the transaction may be justified “ if the goods were sent according to the principal’s order, or even if sent in the usual course of the factor’s employment.”<sup>5</sup>

**279.** It has been held to be fairly within the ordinary course of business, in certain circumstances, for a purchaser to return to a merchant or manufacturer goods bought for which he finds he has no use. Thus, where a lathe was in this way returned to a manufacturer after being retained for six weeks, the Court sustained the transaction on being satisfied of the *bona fides* of the parties.<sup>6</sup> Such proceedings, however, will always be carefully scrutinised, as unusual and forming a likely cover for fraud. In one case a firm of auctioneers, who had sold and delivered to a farmer stock on credit, became suspicious of his solvency, and demanded return of the stock before the farmer’s dispenishing sale.

<sup>1</sup> *Horsbrugh v. Ramsay & Co.*, 1885, 12 R. 1171.

<sup>2</sup> Per L. P. Inglis.

<sup>3</sup> *Gibson v. Forbes*, 1833, 11 S. 916 ; *Taylor v. Farrie*, 1855, 17 D. 639 ; *Miller’s Tr. v. Shield*, 1862, 24 D. 821 ; see *infra*, *Nova debita*.

<sup>4</sup> *Anderson’s Tr. v. Fleming*, 1871, 9 M. 718.

<sup>5</sup> Bell, Com. ii. 205.

<sup>6</sup> *Loudon Bros. v. Reid & Lauder’s Tr.*, 1877, 5 R. 293.

They paid themselves out of the proceeds of the sale, and the farmer having become bankrupt within sixty days, the transaction was held not to be in ordinary course of trade.<sup>1</sup> In another case a farmer, on surrendering the lease of his farm, instructed a firm of auctioneers, with whom he was accustomed to deal, to conduct a dispenishing sale of the farm effects. At the date of instructing the sale, he was in debt to the auctioneers and he was (but not to their knowledge) in embarrassed circumstances, but in employing them he had no intention of giving them a preference over his other creditors. The sale took place within sixty days of his sequestration, and the auctioneers, who had a clause of lien in their conditions of sale, retained from the proceeds of sale the amount due to them. In an action at the instance of the trustee on the sequestrated estate, it was held that, as the transaction was entered into in the ordinary course of trade, and without any intention of conferring a preference, it was not struck at by the statute.<sup>2</sup>

**280.** An important question under this head relates to payments made by bills drawn, or the indorsation of bills, cheques, or other negotiable instruments by the debtor. Such a payment is in effect a transfer of part of the debtor's assets to the receiver, and, unless entitled to protection under the present exception, falls within the scope of the Act. The case of *Horsbrugh v. Ramsay & Co.*<sup>3</sup> above referred to affords an instance of this. Where, again, an insolvent firm of wool-brokers indorsed a cheque to a customer in payment of a prior debt, the transaction was set aside.<sup>4</sup> But where a bill is due at a bank, and the debtor takes it up by sending to the bank to be discounted another bill for the amount, the Act has been held not to apply.<sup>5</sup> And payments by indorsation of bills in the ordinary course of a running account between a banker and his customer, or between merchants, or a principal and agent, will be effectual.<sup>6</sup> But if a bill be past due and protested, the indorsation of another bill in extinction of it will fall under the Act.<sup>7</sup>

**281.** Where the debt or obligation in respect of which a payment by bill is made or goods are delivered is not due or prestable, and the payment or delivery is anticipatory, and therefore not in ordinary course, it will not be entitled to the benefit of the present exception.<sup>8</sup> Thus, where the charterers of a ship, a few days after the execution of the charter-party, accepted at the request of the shipowners a bill at fourteen days to be imputed towards the first instalment of the freight

<sup>1</sup> *Morton's Tr. v. Fifeshire Auction Co., Ltd.*, 1911, 1 S.L.T. 405.

<sup>2</sup> *Crockart's Tr. v. Hay & Co.*, 1913 S.C. 509.

<sup>3</sup> 1885, 12 R. 1171.

<sup>4</sup> *Carter v. Johnstone*, 1886, 13 R. 698.

<sup>5</sup> Bell, Com. ii. 204; *Jamieson v. Ferrier*, 1810, *ibid. cit.*

<sup>6</sup> Bell, Com. ii. 204; *Stein's Crs. v. Forbes*, 1791, Mor. 1142; *Richmond & Freebairn's Tr. v. The Pelican Insurance Office*, 1805, M. App. "Bankrupt," No. 24; *Dundas v. Smith*, 1808, M. *ibid.*, No. 28; *Blinchow's Tr. v. Allan & Co.*, 1828, 7 S. 124; 1831, 9 S. 317; 1833, 7 W. & S. 26.

<sup>7</sup> Bell, Com. ii. 204; *Blaikie v. Wilson*, 1803, *ibid. cit.*

<sup>8</sup> *Blinchow's Tr. v. Allan & Co.*, *supra*; *M'Farlane v. Robb & Co.*, 1870, 9 M. 370; Bell, Com. ii. 204; see *Spcir v. Dunlop*, 1825, 4 S. 92; 1826, 2 W. & S. 253; 1827, 5 S. 729.

when it should become due, and the bill was paid, but the charterers became bankrupt within sixty days of its date and before any part of the freight had become payable, it was held that the bill was reducible under the Act.<sup>1</sup> The uplifting of a discounted accommodation bill before maturity by an insolvent drawer has been held not struck at, in respect the bank had no reason to believe that the drawer was insolvent and that the retiring before maturity was within the ordinary course of business.<sup>2</sup> But where the drawer (a brother of the acceptor), being insolvent, sold effects by auction and instructed the auctioneer to retire an accommodation bill before it had matured, it was held that an illegal preference had been constituted.<sup>3</sup>

282. Again, where the transaction, although ostensibly in course of trade, is attended with circumstances shewing collusion or a contrivance to evade the Act, it will be open to challenge;<sup>4</sup> as where a debtor sells goods to his creditor to enable him to set off the debt due to him against the price, and so to obtain satisfaction to the extent of the value of the goods;<sup>5</sup> or where the bill given in payment is of so distant a date as to shew it to be a security rather than payment.<sup>6</sup> Where a mercantile company, having purchased goods as agents for an employer, sold them without his knowledge, and thereafter, within sixty days of their bankruptcy, transferred to him *ex proprio motu* a quantity of other goods belonging to them in satisfaction of his claim, the transfer was held reducible under the Act.<sup>7</sup> Again, where a commission agent appropriated the proceeds of a bill remitted to him to discount, and thereafter, within the statutory period, remitted to his principal an acceptance of another firm and a bill of lading of goods shipped abroad, with relative draft against the shipment, the Act was applied.<sup>8</sup>

### (iii) *Nova debita.*

283. This class of exceptions embraces all transactions in which the conveyance or other deed or act of alienation by the bankrupt is granted or done in pursuance of an obligation undertaken for a fair and present value given.<sup>9</sup> The statute strikes at deeds granted voluntarily in favour of "creditors" in preference over other creditors, and thus postulates that the grantee is a person occupying the position of a creditor towards the bankrupt prior to the inception of the alienation challenged. This postulate is obviously absent in cases where the act of alienation only gives to the recipient the very thing which, under the particular transaction between him and the bankrupt, he has bargained to get in return for a present value given

<sup>1</sup> *M'Farlane v. Robb & Co.*, *supra*.

<sup>2</sup> *M'Laren's Tr. v. National Bank*, 1897, 24 R. 920.

<sup>3</sup> *Craig's Tr. v. Craig*, 1903, 10 S.L.T. 556.

<sup>4</sup> Bell, Com. ii. 204.

<sup>5</sup> *Stewart v. Scott*, 1832, 11 S. 171; see *Dawson v. Lauder*, 1840, 2 D. 525.

<sup>6</sup> Bell, Com. ii. 204.

<sup>7</sup> *Scougall v. White*, 1828, 6 S. 494.

<sup>8</sup> *White v. Briggs*, 1843, 5 D. 1148.

<sup>9</sup> Bell, Com. ii. 205; Goudy on Bankruptcy, 4th ed., 90.



by him, and that whether the thing is received by him *unico contextu* with the value given, or is made over to him subsequently in implement of an absolute and immediate obligation to that effect undertaken by the bankrupt in consideration of such value given. In neither of these cases can it be said that the bankrupt's act partakes of the nature of a preference to an already existing creditor. Nor can it be said to confer a preference on the grantee by way of "satisfaction" or "further security" in the sense of the statute. Like a payment in cash of a matured money debt, it merely gives him specific implement of a debt immediately exigible by him. The simplest instances of *nova debita* are sales for a fair price paid,<sup>1</sup> or loans upon specific security given by the bankrupt in exchange for the advance.<sup>2</sup> The substitution of a new security for a former one, in consideration of an existing loan being continued, has been sustained.<sup>3</sup>

284. The term *nova debita* has sometimes been used as applicable to transactions originating within the sixty days. There seems to be no special principle involved in this restricted use of the term, and no special convenience in adopting it as matter of nomenclature. From the definition given above (which is in accordance with the more usual use of the term) and the statement of the general principle on which this class rests, it will be seen that the class extends to (1) cases in which the contract has been both made and completed either during the sixty days or after the actual constitution of notour bankruptcy; (2) cases in which the contract has been made prior to the sixty days, and completed during their currency or after actual bankruptcy; (3) cases in which the contract has been made during the sixty days, and completed after actual bankruptcy.<sup>4</sup> The essential element is that the mutual obligations of the contract be undertaken *unico contextu*; and if this be so, the transaction does not lose its character of *novum debitum* by the lapse of an interval of time prior to its execution. Thus, where money was lent on the faith of a specific heritable security bargained to be given therefor, and the bond was not granted for two months thereafter, and sasine thereon was not taken for five years and until the debtor had been sequestrated, it was held that the bond was not reducible under the Act.<sup>5</sup> Similarly, where a disposition was granted and infeftment taken within sixty days of the granter's notour bankruptcy, following on missives of sale entered into five months previously, the Act was held not to apply.<sup>6</sup> Again, where a party bought and paid for wine which was set apart for him by the seller, and, after a lapse of several years another part of the sellers' stock was by agreement substituted for the first, and was ultimately forwarded to the buyer within

<sup>1</sup> *Cranstoun v. Bontine*, 1830, 8 S. 425; *Gibson v. Forbes*, 1833, 11 S. 916; *Taylor v. Farrie*, 1855, 17 D. 639; *Miller's Tr. v. Shield*, 1862, 24 D. 821.

<sup>2</sup> *Bank of Scotland v. Stewart & Ross*, 7th Feb. 1811, F.C.; *Renton & Gray's Tr. v. Dickison*, 1880, 7 R. 951.

<sup>3</sup> *Roy's Tr. v. Colville & Drysdale*, 1903, 5 F. 769.

<sup>4</sup> Goudy on Bankruptcy, 4th ed., 91.

<sup>5</sup> *Cormack v. Anderson*, 1829, 7 S. 868.

<sup>6</sup> *Cranstoun v. Bontine*, 1830, 8 S. 425.



sixty days of the seller's bankruptcy, the transaction was held not reducible by the seller's trustee.<sup>1</sup>

**285.** The consideration given to the bankrupt must be a "fair and present value."<sup>2</sup>

**286.** The principles governing the exception of *nova debita*, as above generally stated, have only been developed in a long course of decisions, in the earlier of which they obtained but partial recognition. The simplest cases falling under the exception, such as a sale for a present price paid, where the contract is performed on both sides *unico contextu*, have always been admitted. But more difficulty arose in applying the rule to cases where transactions, originally entered into before the sixty days, were subsequently completed during their currency, or after actual notour bankruptcy. The completion of the transaction in such cases may be (1) the act of the grantee of the conveyance or other deed of alienation by the bankrupt, or (2) the act of the bankrupt himself in implement of an obligation undertaken by him. These will be dealt with separately; and in regard to the second class it will be necessary to carefully distinguish what kinds of obligations a bankrupt may give implement of notwithstanding the statute.

(iv) *Transactions completed after the beginning of the Sixty Days by the Act of the Grantee.*

**287.** The Act of 1696, c. 5, declares that for the purposes of the Act, all dispositions, heritable bonds, or other heritable rights whereupon infetment may follow, granted by a bankrupt, shall only be reckoned to be of the date of the sasine lawfully taken thereon. It was at first held that the object of this part of the statute was, in every case, to prevent securities from being kept latent, and that, accordingly, wherever the constitution of the real right was delayed, the *jus in re* was separated from the obligation, and the creditor remained a mere unsecured creditor, and that where the completion of the security took place within the sixty days, it was truly of the nature of a security given for a prior debt.<sup>3</sup> This view of the effect of the Act was, however, subsequently departed from, and it was settled that the provision declaring the date of the infetment to be the date of the deed only applies to transactions of such a nature otherwise as to be struck at by the Act, and that it does not affect transactions of the nature of *nova debita*.<sup>4</sup> "The rule laid down was that, where prior to the sixty days a conveyance, whether absolute or in security, has been granted

<sup>1</sup> *Gibson v. Forbes*, 1833, 11 S. 916.

<sup>2</sup> Bell, Com. ii. 205; *Brugh v. Gray*, 1717, Mor. 1125; see *Cranstoun v. Bontine*, *infra*.

<sup>3</sup> Bell, Com. ii. 206-7; *Grant v. Duncan*, 1717, Mor. 1228.

<sup>4</sup> Bell, Com. ii. 207; *Johnstone v. Home*, 1751, Mor. 1130; *Mitchell v. Finlay*, 1799, Mor. App. "Bankrupt," No. 10; *Bank of Scotland v. Stewart & Ross*, 7th Feb. 1811, F.C.; *Cormack v. Anderson*, 1829, 7 S. 868; *Cranstoun v. Bontine*, 1830, 8 S. 425; 1832, 6 W. & S. 79; *Mansfield v. Walker's Trs.* 1833, 11 S. 813; 1835, 1 S. & M'L. 203; *Scottish Provident Institution v. Cohen & Co.*, 1888, 16 R. 112.

in fulfilment of a contract, and something remains to be done by the grantee to complete it—such as taking infetment or giving intimation—the performance of this act within the days of bankruptcy will not be challengeable. The principle upon which the decisions in cases of this kind proceeded is that the completion of the conveyance was a matter within the creditor's own power, and cannot therefore be said to have been done voluntarily by the bankrupt.”<sup>1</sup>

288. The rule may be illustrated by the following two cases:—If A. contracts to lend B. £500 on the specific security of a bond and disposition in security over B.'s property of X., and receives the bond in exchange for the money, but does not record it until within sixty days of B.'s notour bankruptcy, the validity of the security is not affected by the Act, in respect the transaction is a *novum debitum*. If, on the other hand, A. lends £500 to B. without security, and thereafter B., before the sixty days, voluntarily grants a bond over his property to A. in security of the debt, which A. does not record until after the sixty days have begun, then the bond will be held to have been granted of the date of such recording, and will be reducible under the Act. The rule is the same under the existing provision of the Bankruptcy Act, 1913 (s. 4), which makes the date of a deed under the Act of 1696 “the date of the registration of the deed, or of delivery, or of intimation, or of such other proceeding as shall in the particular case be requisite for rendering such deed completely effectual.”<sup>2</sup>

(v) *Transactions completed after the beginning of the Sixty Days by the Act of the Bankrupt.*

289. There is an obvious difference between acts by the grantee of a deed done outwith the control of the bankrupt, as by the recording of an infetment, and acts done by the bankrupt himself; and after the former class had been held exempt from the operation of the Act, the view was taken that the latter, as being voluntary acts, in all cases fell under its provisions. According to this view, the term *voluntary* was held to apply to every act done by the bankrupt, whether spontaneously or in implement of a binding obligation subsisting against him. It was, however, ultimately settled that the statute does not apply to acts done by the bankrupt in specific implement of onerous contractual obligations immediately enforceable against him.<sup>3</sup> Such acts are not voluntary in the sense of the statute. “You cannot say that a deed is voluntary which a party is bound to execute, and which the law will compel him to execute. A voluntary deed is one which the party is at liberty to execute or not as he pleases.”<sup>4</sup> Nor

<sup>1</sup> Goudy on Bankruptcy, 4th ed., 92.

<sup>2</sup> See Bell, Com. ii. 208.

<sup>3</sup> *Cranstoun v. Bontine*, 1830, 8 S. 425; 1832, 6 W. & S. 79; *Gibson v. Forbes*, 1833, 11 S. 916; *Taylor v. Farrie*, 1855, 17 D. 639; *Miller's Tr. v. Shield*, 1862, 24 D. 821; *Renton & Gray's Tr. v. Dickison*, 1880, 7 R. 951; *Lindsay v. Adamson & Ronaldson*, 1880, 7 R. 1036; *Cowdenbeath Coal Co. v. Clydesdale Bank*, 1895, 22 R. 682.

<sup>4</sup> Per Lord Wynford in *Cranstoun v. Bontine*, *supra*.

can such acts be said to be *in satisfaction* to the creditor in the statutory sense, since (like the payment of a money debt in cash) they give him the specific performance to which he is entitled, and not some *surrogatum* or substitute therefor. In some of the more recent decisions on this branch of the law, the rule of the authorities last cited has been illustrated by contrast in various cases, where the Act has been held to invalidate deeds of a bankrupt done in pursuance not of a specific prior obligation, but of an obligation merely general in nature. This is an important distinction, and is more fully dealt with below.

(vi) *Cases where Specific Implement justified.*

**290.** The kinds of obligations of which a bankrupt is entitled to give specific implement will vary according to the contract out of which they arise. The obligation, *e.g.*, may be to deliver moveables, or convey heritage in implement of a contract of sale, or to grant securities thereon in implement of a contract of loan, or under the provisions of a marriage settlement. Thus, in the leading case of *Cranstoun v. Bontine*,<sup>1</sup> a creditor agreed by missives of sale to buy heritage belonging to his debtor at a certain price. After an interval of five months, and within sixty days of the seller's bankruptcy, he granted a disposition in implement of the missives, the price being settled (by a *bona-fide* agreement beyond the sixty days) by setting off against it *pro tanto* a previously existing claim by the purchaser against the seller. The disposition was held not reducible under the Act. Lord Balgray, who gave the leading judgment in the Court of Session, said: "It never has been held since *Watson's Crs.*,<sup>2</sup> that any insolvent party might not, as late as the last hour before bankruptcy, make an onerous sale for a fair price. By such a transaction the creditors sustain no injury. If the subject be gone, the price comes in place of it." Again, in the case of *Taylor v. Farrie*,<sup>3</sup> A. agreed to take C. into partnership on the expiry of an existing copartnery between A. and B. On the day fixed C. paid his stipulated share of capital. A few days thereafter, A., by a new arrangement, sold to C. the whole stock-in-trade, business, etc., C. getting credit in settling the price for the money already paid under the partnership arrangement. Three days afterwards, and within sixty days of A.'s notour bankruptcy, C. obtained possession of the subjects of sale from A. It was held by the whole Court that the transference within the sixty days having been in specific implement of a valid obligation *ad factum præstandum*, undertaken beyond the sixty days, was not "voluntary" or "in satisfaction" in the sense of the statute, and could not be set aside. In the case of *Miller's Tr. v. Shield*,<sup>4</sup> the bankrupts, prior to the sixty days, wrote a letter to the defender, saying: "We have this day sold you 100 tons guano at £6 per ton, payment to be made by your acceptance at four months. The guano to be delivered as required. We.

<sup>1</sup> *Cranstoun v. Bontine*, *supra*.

<sup>2</sup> 1855, 17 D. 639.

<sup>3</sup> 31st July 1724, Edgar, p. 117.

<sup>4</sup> 1862, 24 D. 821.



however, reserve right to repurchase at same price at any time during the currency of the acceptance." The acceptance was granted and deposited with a bank, who advanced money on it, and it was duly retired by the defender. The guano was delivered to the defender six days before sequestration of the bankrupts. It was held that the delivery of the guano, being in fulfilment of a legal obligation undertaken *simul ac semel* with the advance of the money, was not a contravention of the Act, and that whether the transaction recorded in the bankrupts' letter was a sale or a loan.

291. In the case of *Renton & Gray's Tr. v. Dickison*,<sup>1</sup> a solicitor, R., whose firm of R. & G. acted for two clients, S. and D., obtained payment from D. of the sum contained in a heritable bond over his property held by S., falsely representing to D. that S. required repayment, and to S. that D. desired to repay the loan. R. offered to S., as a reinvestment, a bond over the house of his partner G., and, this having been agreed to, G., within sixty days of the sequestration of his and the firm's estates, granted the bond to S., who of even date executed a discharge of the bond by D. The trustee on G.'s estate having brought a reduction both of the bond by G. and the discharge, as having been granted to secure a prior debt due by G. to S., arising out of the appropriation by his partner R. of the money received from D. on behalf of S., it was held that the transactions were *nova debita*, and reduction was refused. The Lord Ordinary (Lord Rutherford Clark) refused reduction of the discharge on the ground that G.'s trustee had no title to challenge it, but reduced the bond on the ground that G. had received no value for it; but the Court, reversing the latter part of the judgment, held that the money received by his firm from D. formed good consideration to G., and that the granting of the bond was a specific *pars contractus*. In *Lindsay v. Adamson & Ronaldson*,<sup>2</sup> M. & Co. (the bankrupts), who were part owners and ships-husbands of a vessel abroad, got an advance, before the sixty days, from A. & R. upon the inward freight, and agreed to place the vessel in the hands of A. & R. to collect the freight for their reimbursement. On the arrival of the vessel, A. & R. requested M. & Co. to receive and remit the freight, which they did within the days of bankruptcy. It was held that, as the payments by M. & Co. were made in specific implement of an agreement undertaken more than sixty days before bankruptcy, they were not affected by the statute; and an opinion was expressed by Lord Shand that it would not have made any difference had the original transaction been within the sixty days. His Lordship said: "If a merchant, in the ordinary course of business, advances money to another a month before bankruptcy, on the footing that it will be repaid within a fortnight or so, and at the same time gets a security that will enable him to recover the amount of the advance, and recovers the amount through that security, it appears to me to be unchallengeable under the statute." In the older case of *Mitchell v.*

<sup>1</sup> 1880, 7 R. 951.

<sup>2</sup> 1880, 7 R. 1036.



*Finlay*,<sup>1</sup> a husband, by antenuptial marriage contract, bound himself to infest his wife for her liferent, in case of survivancy, in certain property belonging to him in which he himself was not at the time infest. Two years thereafter, and within a month of his notour bankruptcy, he obtained himself infest, and of the same date his wife was infest on the clause in the contract. It was held that the title so made up could not be reduced under the Act, the husband's infestment not being his own voluntary act, seeing that his onerous obligation in the marriage contract would have entitled the wife to complete her right by expeding infestment in her husband's person as well as her own.

(vii) *Obligations to give Security.*

**292.** An important class of cases, in which the application of the Act has frequently had to be considered, consists of those in which a security is constituted within the days of bankruptcy under a contract previously entered into. Of course, if no security have been stipulated for originally, the voluntary granting of one by the bankrupt clearly falls within the Act. But even where the lender originally stipulates for security, the authorities have drawn a distinction between (1) the case of the bankrupt giving a security specifically stipulated for, and contracted to be immediately given as part of the original bargain; and (2) the case of the bankrupt granting a security in fulfilment of an obligation of a general kind to secure the debt. The general doctrine deduced from the cases on the subject is stated by Mr. Bell<sup>2</sup> to be: "1st. That wherever money is paid or advanced, or property made over in consideration of a general promise of security, not over a specific subject, the distinction is sanctioned between the debt and the security subsequently granted, and in its true intent and meaning the rule of the statute is understood to apply to the security, when it comes to be granted, as being truly a security for a previous debt. . . . 2nd. It has also been held that, wherever there is stipulated a specific security over a particular subject, in consideration and on the faith of which an advance of money or transfer of goods is made, the completion of that security, although after an interval of time, and after the term of constructive bankruptcy has begun, is not within the intent and meaning of the Act." It is necessary to remark, however, that the distinction is not entirely between stipulating for a specific security and for security generally. As will be seen from the authorities below, not only must there be a specific security stipulated for, but it must be contracted to be given forthwith, as being really the basis on which the advance is made.

**293.** The general doctrine is elucidated in the following sentences from the opinion of L. P. Inglis in the case of *Stiven v. Scott & Simson*:<sup>3</sup> "An obligation of a general kind to give security is plainly nothing at

<sup>1</sup> 1799, Mor. App. "Bankrupt," No. 10.

<sup>2</sup> Bell, Com. ii. 211.

<sup>3</sup> 1871, 9 M. 923 at 933.

all in itself. It is an obligation, no doubt, that the party is bound in honour to fulfil, but it is an obligation not applicable to any particular subject, and it is not in itself a specific obligation; and until it is made special in some way or other, it cannot be said to be a security for the debt at all. In that view, it is only when the so-called obligation is fulfilled that there comes to be any security. And, therefore, that is the point of time at which the security is granted; and if that point of time occur within sixty days of bankruptcy, the application of the statute is clear, because that is security given within sixty days for a prior debt. But, on the other hand, if the party come under an obligation to do something immediately and unconditionally, it shall have the effect of creating a good security; and when I say come under an obligation, I mean nothing short of this, that he subjects himself to an obligation instantly and absolutely enforceable. When he comes under such an obligation as that, then the fulfilment of that obligation, although within sixty days, will not make a case under the statute, because there the security is substantially granted before the sixty days, and at the same time as the debt is contracted. It is a security contemporaneous, in that point of view, with the contraction of the debt."

294. Accordingly, where money is advanced on the faith of a specific security to be granted for it forthwith, the transaction is a *novum debitum*, and if the debtor grants the particular security in implement of the bargain within the sixty days, the security will not be reducible under the Act.<sup>1</sup> "But the security granted is voidable where the obligation to grant it (1) is undertaken subsequent to entering into the contract, or (2) although *in gremio* of or contemporaneous with the contract, is only an obligation or promise in general terms to grant security, or (3) is an obligation to grant some specified class of security which fails of being sufficiently specific as to the subject-matter, or is indefinite as to the time of performance."<sup>2</sup>

295. The following cases may be referred to as illustrating the rule formulated in the passage just quoted. In *Moncrieff v. Union Bank*<sup>3</sup> a party, six months before bankruptcy, received an advance from a bank in exchange for his promissory note, along with a letter addressed by him to the bank binding himself at "any time required" to assign to the bank, in security of the advance, a certain bond and two policies of insurance, which he then deposited with the bank. Six days before his bankruptcy, he, upon the requisition of the bank, assigned the securities in question to them in terms of the letter of obligation. The assignation was held reducible under the Act. Here the security was perfectly specific, and the debtor had come under an enforceable obligation to grant it. The defect in the transaction was that, as the terms of

<sup>1</sup> *Bank of Scotland v. Stewart & Ross*, 7th Feb. 1811, F.C.; *Cormack v. Anderson*, 1829, 7 S. 868; *Miller's Tr. v. Shield*, 1862, 24 D. 821; *Renton & Gray's Tr. v. Dickison*, 1880, 7 R. 951; *Lindsay v. Adamson & Ronaldson*, 1880, 7 R. 1036; *Cowdenbeath Coal Co. v. Clydesdale Bank*, 1895, 22 R. 682.

<sup>2</sup> Goudy on Bankruptcy, 4th ed., 96.

<sup>3</sup> 1851, 14 D. 200.

the letter of obligation shewed, "the instant granting of the security was not the consideration of the advance. There was no absolute stipulation for the security at the time of the advance; on the contrary, the borrowers were, by the terms of the missive, bound to grant the assignation at any time required. So far, then, from the granting of the security being the instant consideration for the advance of the money, the defenders were satisfied with the promissory note, and it was to be a matter of after consideration whether they should require the security or not."<sup>1</sup>

296. A very similar question occurred in *Gourlay v. Mackie*,<sup>2</sup> and was decided in the same way. The bankrupts had obtained an advance from the defender, in exchange for which they granted their promissory note, and deposited with the defender a certificate of certain shares, along with a letter stating that, "in consideration of" the advance, they made the deposit and bound themselves to transfer the shares to the defender at any time during the currency of the bill, if so desired by him. The securities were transferred in implement of this obligation within sixty days of bankruptcy. The Lord Ordinary (Lord Kinneir) held the transfer not reducible, distinguishing the case from that of *Moncrieff v. Union Bank*,<sup>3</sup> on the ground that the terms of the letter shewed that the security upon which the defender made the advance was not the personal obligation in the promissory note, but the specific security of the shares in question. The Second Division of the Court, following the case of *Moncrieff v. Union Bank*, reduced the transfer, on the ground that the statute was excluded only where the security was stipulated for as "a simultaneous and contemporaneous security."

297. In *Stiven v. Scott & Simson*<sup>4</sup> a firm of merchants accepted accommodation bills drawn upon them by another firm, and received by way of security invoices of goods bearing to be sold by the drawers to the acceptors, but really intended as a security only. In accordance with the intention of parties, the goods remained in the possession of the drawers, subject to their control and disposal, and they were not delivered to the acceptors until within sixty days of the drawers' bankruptcy. The delivery was held to be struck at by the Act. In *Rhind's Tr. v. Robertson & Baxter*<sup>5</sup> the Act was applied in somewhat similar circumstances. In *Gourlay v. Hodge*<sup>6</sup> the defender advanced £500 to P. & Co., who handed him in exchange a written obligation in these terms:—"We have this day received from you £500, and we hereby promise to give you, within one month from this date, delivery-orders on stores in Glasgow for wheat, oats, beans, or Indian corn to the full value." P. & Co. then purchased grain in the market, and within sixty days of their bankruptcy handed delivery orders therefor to the

<sup>1</sup> Per L. Fullerton, p. 204.

<sup>2</sup> 1887, 14 R. 403; see *Bank of Scotland v. Lqrs. of Hutchison, Main & Co., Ltd.*, 1913 S.C. 255, affd. 1914 S.C. (H.L.) 1.

<sup>3</sup> *Moncrieff (Tod & Hill's Tr.) v. Union Bank*, 1851, 14 D. 200.

<sup>4</sup> 1871, 9 M. 923.

<sup>5</sup> 1891, 18 R. 623.

<sup>6</sup> 1875, 2 R. 738.



defender. The transaction was set aside. The obligation here implemented by the bankrupts was general in character, both as regards the subject-matter and as to the time of performance. In the case of *Paterson's Tr. v. Paterson's Trs.*<sup>1</sup> the defenders, who were the testamentary trustees of a pawnbroker, entered into an agreement with a relative of the deceased which purported to grant to him a lease of the pawnbroking premises, with the stock of pledges therein, in order that he might carry on the business, he paying rent and interest on the stock, and binding himself, on receiving fourteen days' notice, to cede possession of the premises and the stock therein at the time. After some years, the lessee ceded possession within sixty days of his bankruptcy. It was held that the Act applied, in respect that the obligation of which performance had been made was not specific as to the stock (the *corpus* of which was necessarily a changing one), and also that, under the agreement, the time of performance was postponed and indefinite. In the case of *Price & Pierce v. Bank of Scotland*<sup>2</sup> the owner of certain timber, which was lying in the custody of a firm of storekeepers, borrowed money from a firm of builders, and in security thereof granted them a delivery order for 500 logs, but upon the express condition that it should not be presented to the storekeepers, and on an undertaking that it would be replaced in the course of a few days by another and proper delivery order. Ten days afterwards, when the actual value of the logs was ascertained, the lenders in exchange for the first delivery order (which had never been intimated to the storekeepers) received a delivery order for 420 logs. This order was duly intimated to the storekeepers, and the logs identified. Within sixty days of these transactions the borrower was made bankrupt, and it was held that the second delivery order had been granted in further security of a prior debt and was therefore struck at by the Act.

298. In *Mansfield v. Walker's Trs.*<sup>3</sup> a loan was granted on the faith of heritable security over specific lands. Through the fault of the borrower, the bond given in exchange for the loan, and accepted by the lender under error, included a part only of the lands in question. The mistake was discovered after the borrower had been sequestered, and in order to rectify it he granted a bond of corroboration over the whole lands. The Court by a majority held, *inter alia*, that the Act applied. In the House of Lords the judgment was affirmed, on the ground that the debtor was disabled by his sequestration from granting the bond of corroboration; but the opinion of Lord Brougham was in favour of the application of the Act. The application of the Act has been doubted, on the ground that the bond of corroboration gave the lender the specific security he had stipulated for, and on faith of which he had advanced the money.<sup>4</sup> Conveyances of property made within the sixty days in fulfilment of a promise to give security for a past loan,

<sup>1</sup> 1891, 19 R. 91.

<sup>3</sup> 1833, 11 S. 813, *affd.* 1 S. & M'L. 203.

<sup>2</sup> 1910 S.C. 1095; 1912 S.C. (H.L.) 19.

<sup>4</sup> Goudy on Bankruptcy, 4th ed., 95.



and in lieu of an antecedent binding obligation to grant specific security over other property, which, if implemented timeously, would have been effectual, but which *de facto* was never carried out, have been held to be struck at by the Act, on the ground that the granting of the dispositions was not the substitution of one security for another previously given, but the granting of a security where none previously existed.<sup>1</sup> In *Robertson's Tr. v. Union Bank*<sup>2</sup> an *ex facie* assignation was granted to a bank by a debtor within sixty days of sequestration in security of a debt then due. The debt was subsequently paid off, but further advances were made to the debtor by the bank on the security of the assignation. It was held that the assignation was not challengeable under the Act, in respect that at the date of the sequestration the bank was holding it in security, not for a prior debt but for a debt incurred after the assignation. And where the real effect of a transaction is such as to bring it within the category of *nova debita*, the transaction will be sustained, though the trustee in the bankrupt's sequestration may have a right to go behind the transaction and to examine it in substance. Thus, where a bankrupt, within the sixty days, assigned to trustees certain assets, with the object, firstly, of granting security to three friends in respect of money which they presently advanced to him, and secondly, of renewing the security which a fourth held for sums previously advanced to him, it was held that the continuance of the former advance was itself a valuable consideration; and that as the new arrangement for a larger credit would not have been carried through without the co-operation and concurrence of the fourth friend, the transaction was really a *novum debitum*.<sup>3</sup>

SUBSECTION (6).—*Title and Interest to Challenge Preferences.*

299. According to the construction put upon the statute at an early stage and since adhered to, the title to challenge deeds granted in contravention of its provisions is restricted to those creditors whose debts were in existence at the date when the preference was granted. The challenge may be made by the following persons: (1) An individual creditor may challenge a preference if his debt have been contracted prior thereto;<sup>4</sup> but he has no title to recover the subject of it directly, either for himself or as trustee for other creditors, the effect of the challenge, if successful, being merely to lay it open to attachment by diligence. This right does not fall by the occurrence of sequestration, although the trustee (as stated below) has a concurrent title to make the challenge; nor is it destroyed by an adverse interest in the general body of creditors.<sup>5</sup> (2) A trustee in a sequestration has by statute a

<sup>1</sup> *Hill's Trs. v. Macgregor*, 1901, 8 S.L.T. (O.H.) 484.

<sup>2</sup> 1917 S.C. 549.

<sup>3</sup> *Browne's Trs. v. Browne*, 1902, 10 S.L.T. (O.H.) 97.

<sup>4</sup> Bell, Com. ii. 194-5; *Man v. Walls*, 1702, Mor. 1006; *Barclay v. Lennox*, 1783, Mor. 1151; *Cook v. Sinclair & Co.*, 1896, 23 R. 925.

<sup>5</sup> *Brown & Co. v. M'Callum*, 1890, 18 R. 311.

title to challenge for behoof of all creditors entitled to be ranked on the estate, posterior as well as prior, and he does not now require to aver that he represents any prior creditor.<sup>1</sup> (3) A liquidator of a public company may also challenge preferences, provided he represents prior creditors.<sup>2</sup> (4) A trustee under a private trust for creditors cannot challenge in virtue merely of the conveyance by the debtor of his estate, but he may do so if the trust deed confers express power, and creditors, having themselves a title, accede thereto, and thus impliedly constitute the trustee their representative.<sup>3</sup> (5) The bankrupt cannot in his own right challenge preferences which he has granted. He may, however, acquire right from his creditors to do so where he is reinvested on composition, provided (a) he stipulates for and obtains a special assignation of the creditors' right to challenge; and (b) notice is given to the preferred creditors in course of the composition arrangement that the challenge is intended.<sup>4</sup> (6) The purchaser of a sequestrated estate under a deed of arrangement has no title to challenge preferences granted by the bankrupt without express assignation.<sup>5</sup> But third parties who have obtained a prior disposition or assignation to the subject in question may do so, and that whether the right under the disposition or assignation has been fully completed or not.<sup>6</sup> But a legatee has been held not to have sufficient interest to challenge a preference given by a bankrupt heir to a creditor of the ancestor.<sup>7</sup> An interest as well as a title is required to support the challenge, as in other actions. The transaction will be set aside only so far as the interest of the challenger extends; and the challenge will fail if it appear that it would confer no benefit on the pursuer, as where, *e.g.*, the reduction of a transaction would only have the effect of opening up the fund to the claim of some other person.<sup>8</sup>

#### SUBSECTION (7).—*Form and Effects of Challenge.*

##### (i) *Form.*

**300.** The Bankruptcy Act, 1913,<sup>9</sup> provides: "Deeds made void by this Act, and all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or common law, may be set aside either by way of action or exception, and a decree setting aside the deed by exception shall have the like effect, as to the

<sup>1</sup> Bankruptcy Act, 1913, s. 9.

<sup>2</sup> See *Clark v. West Calder Oil Co.*, 1882, 9 R. 1017.

<sup>3</sup> *Fleming's Trs. v. M'Hardy*, 1892, 19 R. 542; *M'Laren's Tr. v. National Bank*, 1897, 24 R. 920.

<sup>4</sup> Bankruptcy Act, 1913, s. 137; *Bryce v. Monteith*, 20th Feb. 1818, F.C.; *Drummond v. Watson*, 1850, 12 D. 604; *Slade v. Crawford*, 1806, and *M'Fee v. M'Gilvray*, 1899, noted in Bell's Com., 5th ed., ii. 459.

<sup>5</sup> *Smith & Co. v. Smyth*, 1889, 16 R. 392.

<sup>6</sup> *Shaw v. Hall*, 1747, Mor. 1150; *Wright v. Walker*, 1839, 1 D. 641.

<sup>7</sup> *Borthwick v. Hilson*, 1838, 16 S. 1158.

<sup>8</sup> *Ker v. Dickson & Graham*, 1830, 8 S. 408; *Bett v. Arnot*, 1828, 6 S. 1031; *Dixon, etc. v. Cowan*, 1828, 7 S. 132; *Brown & Co. v. M'Callum*, 1890, 18 R. 311.

<sup>9</sup> Sec. 8.

party objecting to the deed, as if such decree were given in a decree at his instance : and this section shall apply as well in the Sheriff Court as in the Court of Session.” A challenge by direct action may, according to circumstances, be in form of a reduction (competent only in the Court of Session) or of a declarator, or of a petitory process, with or without declaratory conclusions.<sup>1</sup> Under the head of “exception” is included the case of a pursuer who challenges in replication a deed or other transaction founded on by the defender in support of his case.<sup>2</sup> Where the challenge is by a direct action in the Court of Session, it may be tried with or without a jury. In the case of a circuitous preference by means of a conveyance to an interposed third party, both he and the creditor intended to be favoured should be called as parties.<sup>3</sup>

**301.** In an action by a single creditor, the claim will simply be to set aside the deed challenged ; where by a trustee in a sequestration, there should be a further claim for repetition. It is competent to include, in an action of reduction at the instance of a creditor, a conclusion for payment of the creditor’s claim, so as to enable diligence to be done against the fund on the alienation being set aside.<sup>4</sup> The material averments are (1) that the debtor is notour bankrupt ; (2) that the deed was granted voluntarily and in satisfaction or further security of prior debt ; (3) that it was granted at or after notour bankruptcy, or within sixty days before it ; and (4) except when the action is by a trustee in a sequestration, that the challenge is made by or on behalf of a prior creditor.

#### (ii) *Effect of Challenge.*

**302.** The effect of decree setting aside the transaction, when obtained by an individual creditor, is to lay the subject open to the diligence or claims of creditors, according to their respective priorities or preferences.<sup>4</sup> Where sequestration has supervened, the subject will become part of the general estate of the bankrupt, subject to any claims of preference thereon at the instance of individual creditors ; and if the trustee be pursuer, he will be entitled to conclude for and obtain possession or payment of it.<sup>5</sup> If the creditor receiving the preference have disposed of the subject before the action, he must account for the value ; but if he have acted in good faith, he may not be bound to make good more than the value he has himself received for it.<sup>6</sup> The subject itself cannot be vindicated from a third party who has acquired it onerously and in good faith from the creditor.<sup>7</sup>

**303.** Creditors challenging a preference must make *restitutio in integrum* so far as regards any benefit that may have accrued to them

<sup>1</sup> See *Cook v. Sinclair & Co.*, 1896, 23 R. 925, per Lord M'Laren.

<sup>2</sup> *Dickson v. Murray*, 1866, 4 M. 797 ; *Mackenzie v. Calder*, 1868, 6 M. 833.

<sup>3</sup> *M'Dougall's Tr. v. Gibbon*, 1889, 16 R. 740.

<sup>4</sup> *Cook v. Sinclair & Co.*, *supra*, per Lord M'Laren.

<sup>5</sup> Bell, Com. ii. 216.

<sup>6</sup> *Drummond v. Watson*, 1850, 12 D. 604.

<sup>7</sup> See *Drummond v. Watson*, *supra* ; *Adamson, Howie & Co. v. Guild*, 1868, 6 M. 347.



from the transaction sought to be set aside.<sup>1</sup> But they are not bound to repon the preferred creditor to former rights, in relation either to estate of the bankrupt not under their control, or to third parties, which the creditor may have renounced in consideration of the alienation challenged.<sup>2</sup> Thus, where he had in respect of the preference challenged given up a bill accepted both by the bankrupt and a third party, his right did not revive against the third party upon the preference being set aside.<sup>3</sup> The reduction will not affect any alternative title by which the creditor may claim the subject ;<sup>4</sup> and a right acquired against a third party will not be affected, if its retention does not diminish the bankrupt estate.<sup>5</sup>

## APPENDIX TO BANKRUPTCY AND INSOLVENCY.

### ACT OF BANKRUPTCY.

1. Act of bankruptcy is a term of English law used to denote certain kinds of acts on the part of a debtor which have been prescribed by statute as *indicia* of insolvency, rendering him liable to be adjudged bankrupt. They are in some respects analogous to the tests or *indicia* of notour bankruptcy in the law of Scotland. No person is liable to be adjudged bankrupt who has not committed an act of bankruptcy. Acts of bankruptcy are entirely statutory. They were first introduced in the Act 13 Eliz. c. 7, and they have been added to and altered by subsequent statutes.

2. By the Bankruptcy Act of 1914<sup>6</sup> a debtor commits an act of bankruptcy in each of the following cases :—

- (a) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally ;
- (b) If in England or elsewhere he makes a fraudulent conveyance, gift, delivery, or transfer of his property, or of any part thereof ;
- (c) If in England or elsewhere he makes any conveyance or transfer of his property or any part thereof, or creates any charge thereon, which would under this or any other Act be void as a fraudulent preference if he were adjudged bankrupt ;
- (d) If with intent to defeat or delay his creditors he does any of the following things, namely, departs out of England, or being out of England remains out of England, or departs from his dwelling-house, or otherwise absents himself, or begins to keep house ;
- (e) If execution against him has been levied by seizure of his goods under process in an action in any Court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the Sheriff for twenty-one days ;
- (f) If he files in the Court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself ;
- (g) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him in England, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within seven days after

<sup>1</sup> Bell, Com. ii. 217 ; *Balfour v. Miller*, 1822, 1 S. 501.

<sup>2</sup> Bell, Com. ii. 217.

<sup>3</sup> *Black v. Cuthbertson*, 15th Dec. 1814, F.C.

<sup>4</sup> *Blincoe's Tr. v. Allan*, 1831, 9 S. 317 ; 1833, 7 W. & S. 59, per L. C. Brougham.

<sup>5</sup> *Low v. Bell*, 1827, 2 W. & S. 579 ; *Low v. Duncan*, 1827, 2 W. & S. 583.

<sup>6</sup> 4 & 5 Geo. V. c. 59, s. 1.



service of the notice, in case the service is effected in England, and in case the service is effected elsewhere, then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained ;

(h) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.

3. An "available act of bankruptcy" means any act of bankruptcy available for a bankruptcy petition at the date of the presentation of the petition on which the receiving order is made.<sup>1</sup>

4. An act of bankruptcy, when once committed, cannot be purged ; but in order that it may be made the ground of a bankruptcy petition, it must have been committed within three months before the presentation of the petition.<sup>2</sup> An act of bankruptcy does not deprive the debtor of his title to sue for debts due to him.

5. The bankruptcy of a debtor, whether it takes place on the debtor's own petition or upon that of a creditor or creditors, is deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him ; or, if he is proved to have committed more acts of bankruptcy than one, to the first act committed within three months prior to the petition.<sup>3</sup> To the date so fixed the title of the trustee to the bankrupt's property draws back, and he may recover such property from persons into whose hands it may have come since then, without prejudice, however, to transactions entered into in *bona fide*, without notice of any available act of bankruptcy having been committed.<sup>4</sup>

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<sup>1</sup> Bankruptcy Act, 1914, s. 167.

<sup>2</sup> *Ibid.* s. 4 (1) (c).

<sup>3</sup> *Ibid.* s. 37 (1).

<sup>4</sup> *Ibid.* s. 45 ; see Williams, Bankruptcy Practice, 13th ed. ; Baldwin on Bankruptcy, 11th ed.

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## BANNERET. BANRENTE.

*See* PEERAGE AND OTHER DIGNITIES.

## BANNOCK.

*See* THIRLAGE.

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## BANNS.

*See* MARRIAGE.

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## BARBED WIRE.

*See* BOUNDARIES AND FENCES.

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## BAR OF TRIAL.

*See* CRIME (PROCEDURE).

# BARON.

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### SECTION 1.—MODERN TITLE.

**304.** In ordinary modern usage the term “baron” means a member of the peerage whose degree of nobility is next after that of a viscount. A baron in this sense is addressed as “the Right Honourable the Lord —,” and he signs by the title of his peerage.<sup>1</sup>

### SECTION 2.—HISTORY.

**305.** In its modern sense the term has ceased to apply to many who were in earlier days known as barons and enjoyed rights of barony which were of importance both in the constitutional and the feudal law of Scotland. Originally a baron was anyone who held his lands directly of the Crown. As an incident of his tenure, such a Crown vassal, however small his holding, had a right to sit in, and was bound to attend, Parliament. In the course of time, owing to the practice of conferring grants or patents of peerage, some of the barons were dignified, while others were not. Erskine<sup>2</sup> states that the barons who were so dignified came to be known as the *majores* or greater barons, while the others were known as the *minores* or lesser barons.

**306.** In time the number of the minor barons became so great that it was impracticable for them all to attend Parliament. Accordingly, it was provided by the Act 1427, c. 101, that the “small barrones and free tennentes neid not cum to Parliaments nor generall Councils,” provided that there was sent from each sheriffdom, chosen at the head court of the sheriffdom, “twa or maa wise men,” according to the size of the sheriffdom. These representatives were called “commissares,” afterwards commissioners of the shire. The commissioners were to chose “ane wise man and expert,” called the common speaker of the Parliament, who should make representations as to all matters pertaining to the commons in Parliament or General Council. The commissioners represented their shire, and their expenses were to be borne by their constituency. The same Act provided that all bishops, abbots, priors, dukes, earls, “Lords of Parliament, and Banrentes” would be summoned to Parliament by special precept by the King. Under this

<sup>1</sup> Act, 1672, c. 21 (c. 47 in Thomson's Acts).

<sup>2</sup> Inst. i. 3, 3.

Act, therefore, the minor barons elected and sent representatives to Parliament while the greater barons attended in person.

**307.** The general exemption from the duty to attend Parliament conferred by the Act of 1427 was restricted in the Acts 1457, c. 75, and 1503, c. 78, but was restored and confirmed by the Act 1587, c. 114. This Act provided that "all free-holders of the King under the degree of Prelates and Lords of Parliament" were to be warned to attend at the election of the commissioners. The obligation of the lesser barons to attend Parliament was thus removed, but their right to do so appears never to have been taken away. It was hardly ever exercised owing to the trouble and expense involved, and finally the lesser barons were regarded as having no right to sit in Parliament except as representative commissioners. The right of the lesser barons to elect commissioners was never questioned. By the Act 1681, c. 21, the right to elect commissioners was confined to those who were publicly infeft in property or superiority and in possession of a 40s. land of old extent holden of the King or Prince, or, "when the said old extent appears not," were infeft in lands liable in public burdens for His Majesty's supplies of £400 of valued rent. This franchise continued until the Reform Act, 1832 (2 & 3 Will. IV. c. 65).

**308.** The greater barons, on the other hand, were not exempted from attending Parliament, and continued to be personally summoned thereto. In time the duty of attending Parliament tended to become in fact divorced from the tenure of a fief, and the word baron was used to imply a personal dignity conferred by patent, the dignity of a lord or baron of Parliament. Succession to such a barony was by blood descent and not by the inheritance or purchase of a feudal holding, and this was the position at the date of the Treaty of Union, when the Scottish peerage was stereotyped.<sup>1</sup>

### SECTION 3.—FEUDAL BARON.

**309.** In its feudal connection the word baron applied to those who held their lands by a particular form of feudal title. In the wider sense all who held their lands of the Crown were barons. In the strict feudal sense a baron was one whose lands held of the Crown had been erected or confirmed by the King *in liberam baroniam*. To this peculiar title special rights and privileges were attached. See "BARONY TITLE." A barony title did not of itself confer any dignity upon the vassal. He need not necessarily be an esquire, and he does not subscribe by his surname alone or by the name of his lands.

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<sup>1</sup> This sketch is necessarily incomplete. For further information see Rait, *The Parliaments of Scotland*, p. 178 *et seq.*

## BARONET.

*See* PEERAGE AND OTHER DIGNITIES.



# BARONY TITLE.

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## SECTION 1.—DEFINITION.

**310.** A barony is an estate created by direct grant from the Crown erecting (or confirming the erection of) the lands embraced by the grant *in liberam baroniam*, *i.e.* into a freehold barony. The Crown alone had the right to create baronies, and the proprietor of a barony could not dispoise it to be holden *de se*, though he might dispoise part of the lands comprised within the barony to be holden *de se*.<sup>1</sup> In modern times a barony title was obtained by petition to the Treasury. The barony could be disjoined without a petition.<sup>2</sup> Tenure by barony is “the highest and most privileged tenure of land” known to the Scottish feudal system, and carries with it a number of special rights and advantages.

## SECTION 2.—BARONY JURISDICTION.

**311.** A grant of barony carried with it both civil and criminal jurisdiction. Lord Neaves, indeed, says that the proper characteristic of a barony is that it confers jurisdiction, and that “that is the original meaning of it.”<sup>3</sup> The extent of the jurisdiction of the baron was governed by the terms of his charter of erection. It commonly included all crimes except treason and the four pleas of the Crown, *viz.* murder, robbery, fire-raising, and rape; jurisdiction even in the four pleas was sometimes conferred. Jurisdiction in capital crimes, except perhaps theft, required infeftment *cum fossa et furca*, with pit and gallows, the possession of such jurisdiction being “the true mark of a true baron in the ancient time.”<sup>4</sup> The baron could confer some degree of this criminal jurisdiction on his vassal, but only cumulatively with his own.

**312.** In civil matters the baron was judge in disputes arising among his tenants, such as actions for debt, possessory actions, and the like;

<sup>1</sup> Ersk. Inst. i. 4, 27.

<sup>2</sup> Menzies, Conveyancing, p. 839; Duff, Feudal Conveyancing, pp. 251 and 252.

<sup>3</sup> *Agnew v. Lord Advocate*, 1873, 11 M. 309, at p. 332.

<sup>4</sup> Innes, Scotch Legal Antiquities, p. 58.

and he also decided questions arising between himself and his tenants regarding the observance of the conditions in their tacks, payment of feu-duties and maills or rents, and other estate matters. The vassals of the barony were bound to give suit and attendance at the Baron's Court, which was held periodically for the despatch of judicial and estate business. The jurisdiction was in practice exercised by the baron through his deputy, known as the baron bailie. It was a source of not inconsiderable income, as the baron was entitled to the fines and escheats incidental to the administration of justice in his Court. The commission granted by the baron in favour of a bailie, entitling him to hold Courts for the trial of civil or criminal cases, was termed a Letter of Bailyary.

**313.** The Baron Courts were abolished by Cromwell in 1654, but were revived at the Restoration. In 1747, however, the Act 20 Geo. II. c. 43, finally deprived the barons of the wide powers previously enjoyed by them within their lordships, and limited their jurisdiction, in criminal cases, to assaults, batteries, and smaller crimes, with a narrowly restricted power of punishment, and, in civil cases, to actions for debt or damages not exceeding forty shillings sterling. The latter limitation did not apply to actions by the baron for recovering or uplifting from the vassals, tenants, or possessors of the lands the maills and duties or rents and profits thereof, or for recovery of multures or services payable or prestable to the baron's mills. A reservation was also made in this Act in favour of existing jurisdictions of fairs and markets, coalworks, saltworks, and mines. It was further provided that future grants should not confer more than the limited civil jurisdiction above described. The curtailed jurisdiction which this Act suffered to remain in the hands of the barons, although never abolished, has long been quite obsolete.

### SECTION 3.—UNION OF LANDS.

**314.** The erection of feudal subjects into a barony united the whole of the subjects erected into one feudal tenement.<sup>1</sup> This, together with the fact that the granter was the Crown, had important results.

(a) The barony can be competently conveyed by its general name. No detailed specification of its constituent parts is necessary, but in practice charters of union and erection almost invariably contain some specification of the component parts of the barony, and this detailed description is generally and ought always to be continued in subsequent transmissions of the lands.

(b) Although the barony might comprise discontinuous subjects and subjects which required different symbols of delivery, delivery of earth and stone at any spot on the lands comprising the barony was sufficient for taking sasine of the whole. This was certainly the case when the subjects were contiguous, and was usually expressly provided for by a clause of union and dispensation declaring this privilege; but it followed as

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<sup>1</sup> Bell, *Convey.*, 3rd ed., i. 660.

the result of the erection of the lands into a barony, although no such clause was to be found in the charter. Where the lands were discontinuous it appears to have been doubtful whether this privilege was conferred if there was not a particular place appointed in the clause of union for the purpose of taking sasine of the whole.<sup>1</sup>

SECTION 4.—SUBJECTS INCLUDED IN, OR WHICH MAY BE ACQUIRED BY PRESCRIPTION UPON, A BARONY TITLE.

SUBSECTION (1).—*General.*

**315.** It is in this respect that a barony title still retains a special importance in conveyancing, and its peculiar character is illustrated. It is well to bear in mind in this connection that a title may, on the one hand, convey certain subjects, and on the other be merely habile to convey certain subjects. In the latter case the question whether in fact the subjects have been conveyed will depend upon possession. “A general conveyance of a barony carries all parcels of land which belong to the barony, or have been prescriptively possessed, without the necessity of special enumeration.”<sup>2</sup> “As the name of barony is a *nomen universalis*, the title is sufficient to include, without enumeration, or its being expressed, every part and parcel of it, and every right and privilege connected with the barony and naturally incident to it; everything, in short, that may be supposed might naturally accompany and form part and pertinent of a grant of so high a character.”<sup>3</sup>

**316.** As the grant of a barony flows from the Crown it is habile to include a grant of one of the *regalia*, which may be communicated to a subject without special mention; whereas a subject superior's grant or a Crown grant without a clause of erection is not habile to do so unless it contains special words habile to convey the subject in question.<sup>3</sup> Thus, in a question of salmon fishing, “a barony title *cum piscationibus* is no better than a barony title without the clause,”<sup>4</sup> because whether with or without the words *cum piscationibus* it is habile to cover a grant of salmon fishing, and is consequently a sufficient title upon which to prescribe a right to salmon fishing. An ordinary title without the words *cum piscationibus* is not habile to convey a right of salmon fishing, and possession of salmon fishing upon such a title will not avail for the purpose of prescription. “If the charter of erection gives right to any of the *regalia*, these will be transmitted by a conveyance of the barony without special mention.”<sup>5</sup> Thus, if a subject superior conveys land and salmon fishings to A, and A subsequently conveys the lands to B, B will get no right to the salmon fishings. If the subjects erected into a barony

<sup>1</sup> Duff, *Feudal Conveyancing*, p. 113.

<sup>2</sup> *Lord Advocate v. Cathcart*, 1871, 9 M. 744, per Lord President Inglis at p. 749.

<sup>3</sup> *Duke of Montrose v. Macintyre*, 1848, 10 D. 896, per Lord Wood at p. 914.

<sup>4</sup> *Lord Advocate v. Cathcart*, 1871, 9 M. 744, per Lord President Inglis at p. 749; *Duke of Richmond v. Earl of Seafield*, 1870, 8 M. 530.

<sup>5</sup> *Lord Advocate v. Cathcart*, 1871, 9 M. 744, per Lord President Inglis at p. 749.



expressly include salmon fishings and the barony is disposed to a third party, he will obtain a right to the salmon fishings although these are not specially mentioned, because by the original grant of the barony they have been expressly made part of the *universitas* which is the barony.

**317.** "Possession of part of a barony is equivalent to possession of the whole in this sense, that if it can be shewn from the original charter of erection or other authentic writs that a certain parcel of land, of which the baron has had no possession, belongs to the barony, the possession of the other parts will be as effectual as if he had possessed that part."<sup>1</sup> In a question of prescription, therefore, possession in such a case operates to establish the right, and is not the measure of the right; the original writ determines what is conveyed, and possession of any part of the *universitas* conveyed is possession of the whole, and establishes the right to the whole.

**318.** When, however, the subject is not one expressly mentioned in the original barony title, but is one which the barony title is merely habile to convey, *e.g.* salmon fishings in a barony title without mention of fishings, or *cum piscationibus* merely, not *piscationibus salmonum*, possession operates to establish, and is also in a peculiar way the measure of the right so established.<sup>2</sup> In such a case prescriptive possession of salmon fishings in the sea *ex adverso* of some of the lands included within the barony entirely disconnected from other lands within the barony will not give right to all salmon fishings within the barony, but only to the salmon fishings which have been actually possessed. It is possible to prescribe a right to a discontinuous subject as a part and pertinent upon an ordinary title provided it is not a bounding title; and this applies to a barony title as well, and with particular force, as a barony title may well include discontinuous subjects; but in such a case, as well as in the case of *regalia*, the theoretical basis of the rule must be kept in view. It is this, that when the Crown grants a barony title, that is a title habile to convey discontinuous subjects or *regalia*, it is presumed from possession of such subjects upon such a grant that these subjects were intended to be conveyed. Thus, when several discontinuous subjects on the seashore are comprised in a barony either without the words *cum piscationibus* or with those words, the title is habile to convey the salmon fishings in the sea *ex adverso* of each discontinuous piece of land. Salmon fishing is a separate tenement, and if the grant had been an express one the salmon fishings *ex adverso* of each parcel of land would have required to be expressly mentioned, and they would then have been united into the *universitas* by the erection of the barony. Consequently, where this has not been done, possession of the salmon fishings *ex adverso* of one of the parcels of land creates the presumption that that particular fishing was intended to be included in the barony, but it can raise no presumption as to the salmon fishings *ex adverso* of the other lands.

<sup>1</sup> *Lord Advocate v. Cathcart*, 1871, 9 M. 744, per Lord President Inglis at p. 749; and Ersk. Inst. ii. 6, 18.

<sup>2</sup> *Lord Advocate v. Cathcart*, 1871, 9 M. 744.



**319.** So, again, with discontiguous pertinents, if they have been truly possessed as pertinents of the undoubted barony, they are presumed to have been intended to be included in it. But this presumption may be rebutted, and will be rebutted if it is shewn that the subject in question could not, owing to its distance from the general barony estate, be capable of being treated in a reasonable sense as a pertinent of it. The presumption is contradicted by the history of the title or the facts, *e.g.* when the subjects originally united into the barony undoubtedly did not include a discontiguous piece of land and all subsequent additions to the barony were expressly mentioned and incorporated in it, and the subject in question was never mentioned among the additions to the barony, though it may have been possessed for the prescriptive period by the person who possessed the barony.<sup>1</sup> It must also be kept in view that a barony title may mention boundaries and operate as a bounding title so that subjects beyond the boundary cannot be prescribed.<sup>2</sup>

#### SUBSECTION (2).—*Particular Subjects.*

**320.** It remains to set out what subjects have been held to be included or to be capable of being prescriptively acquired upon a barony title.

##### (i) *Regalia Minora.*

**321.** It is now settled that a barony title does not impliedly convey *regalia minora*. If it conveys them expressly, they will be transmitted to a donee without express mention. It is, however, a *habile* title to convey them, and if they have been possessed for the necessary period, a prescriptive right will be established. Salmon fishings, *e.g.*, may be expressly granted in a barony title. If they are not expressly granted, a barony title with or without the words *cum piscationibus* will not of itself convey them,<sup>3</sup> but they are capable of being acquired by prescriptive possession upon such a title.<sup>4</sup> The prescriptive possession must be attributable to the barony title.<sup>5</sup> The extent of the right so acquired has been noticed above.<sup>6</sup>

**322.** A barony title never impliedly conveyed the rights inherent in a free port of exacting shore dues and other such petty customs, nor those which were included under a free forest.<sup>7</sup> In the case of the *Earl of Stair v. Austin*<sup>8</sup> the proprietor of a barony had erected a small harbour on the seashore. He had no express grant of harbour; he had possessed the harbour for the prescriptive period, but his possession was not

<sup>1</sup> *Lord Advocate v. Hunt*, 1867, 5 M. (H.L.) 1.

<sup>2</sup> See *Lord Advocate v. Wemyss*, 1899, 2 F. (H.L.) 1.

<sup>3</sup> *Ersk. Inst. ii. 6, 18*; *Duke of Richmond v. Earl of Seafeld*, 1870, 8 M. 530, per Lord Justice-Clerk Moncreiff at p. 540.

<sup>4</sup> *Nicol v. Lord Advocate*, 1868, 6 M. 972; *Duke of Richmond v. Earl of Seafeld*, *supra* *Lord Advocate v. Cathcart*, 1871, 9 M. 744.

<sup>5</sup> *Milne's Trs. v. Lord Advocate*, 1873, 9 M. 966.

<sup>6</sup> See *Lord Advocate v. Cathcart*, *supra*.

<sup>7</sup> *Ersk. Inst. ii. 6, 18.*

<sup>8</sup> 1880, 8 R. 183.

possession as of a free port; he was held not entitled to exclude from the use of that part of the seashore where the harbour was built those who used it for the purpose of navigation, or to exact harbour dues from them.

A right of ferry over a navigable river may be acquired by prescriptive possession upon a barony title with a clause of parts and pertinents, but containing no express mention of any right of ferry.<sup>1</sup>

(ii) *Mussel Scalps.*

**323.** A barony title with fishings followed by exclusive possession will give the proprietor of the barony the exclusive property in, and right to, mussel scalps between high- and low-water mark *ex adverso* of the lands,<sup>2</sup> but apparently will not do so if exclusive possession has not followed upon it.<sup>3</sup>

(iii) *Sea Ware.*

**324.** Sea ware is not *inter regalia*, and a barony title which does not mention the sea but applies to lands *de facto* bounded by the sea, includes, as an inherent part of the grant, the right to take sea ware cast on the shore *ex adverso* of the lands.<sup>4</sup>

(iv) *Foreshore and Submarine Minerals.*

**325.** A barony title to lands *de facto* bounded by the sea, clothed with prescriptive possession, will establish right to the foreshore although the title contains no express grant of foreshore.<sup>5</sup> It has never been expressly decided that a mere grant of barony will of itself carry the foreshore without express mention of the foreshore or of a seaward boundary which includes the foreshore. That question was raised but was not decided in *Lord Advocate v. Wemyss*.<sup>6</sup>

**326.** The right to the foreshore, if established, gives right to the minerals below the foreshore. In the case of *Wemyss* it was held in the Court of Session (1) that a barony title with an express right of taking coals *infra fluxum maris intra bondas prædictas* was an express title to work the coal under the foreshore, but implied an exclusion of any right to work coal beyond low-water mark, so that possession of such coal was possession without a title; and (2) that a barony title with parts and pertinents would not of itself confer right to coal below low-water mark, but, if clothed with possession for the prescriptive period of coal below low-water mark, would confer right to the submarine coal so far as work-

<sup>1</sup> *Duke of Montrose v. Macintyre*, 1848, 10 D. 896.

<sup>2</sup> *Duchess of Sutherland v. Watson*, 1868, 6 M. 199; see also *Lindsay v. Robertson*, 1867, 5 M. 864, and 1868, 6 M. 889.

<sup>3</sup> Bell's Lect., 3rd ed., p. 605; cf. *Duke of Argyll v. Robertson*, 1859, 22 D. 261.

<sup>4</sup> *Lord Saltoun v. Park*, 1857, 20 D. 89.

<sup>5</sup> *Agnew v. Lord Advocate*, 1873, 11 M. 309; *Buchanan & Geils v. Lord Advocate*, 1882, 9 R. 1218; *Lord Advocate and Clyde Trs. v. Lord Blantyre*, 1879, 6 R. (H.L.) 72.

<sup>6</sup> 1899, 2 F. (H.L.) 1.

able from the barony lands and within the lateral boundaries of the barony. In the opinions expressed to the effect that in the case of the former title the right to work the coal could not be extended by possession and that this was a bounding title, the second point was left open.

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## BAR, PERSONAL.

*See* PERSONAL BAR.

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## BARRATRY.

*See* CRIME ; INSURANCE (MARINE).

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## BARRIER ACT.

*See* CHURCH.

# BARTER.

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### SECTION 1.—DIFFERENCES BETWEEN BARTER AND SALE AT COMMON LAW.

**327.** The contract of barter, or exchange, closely resembles sale in substance and form, in that the object of both is the transfer of the property or ownership in things for value, and both contracts are consensual. At common law in Scotland the only important difference was that in barter no property passed until both subjects had been delivered; <sup>1</sup> whereas in sale, unless otherwise stipulated, <sup>2</sup> the property in the subject sold passed by delivery irrespective of payment of the price. In both, the risk appears to have passed by the contract, <sup>3</sup> and in other respects the legal effect of both contracts would seem to be the same. <sup>4</sup>

### SECTION 2.—EFFECT OF SALE OF GOODS ACT, 1893.

**328.** Since the Sale of Goods Act, 1893, the distinction between sale and barter appears to have become more material, seeing that the property in goods sold may now pass by the contract, <sup>5</sup> whereas the contract of barter is still governed by the common law. It may, therefore, be noted that in England, where the consideration was partly in goods and partly in money, the contract was treated as one of sale. <sup>6</sup>

### SECTION 3.—AUTHORITY OF AGENT TO BARTER.

**329.** References to contracts of sale in other statutes would seem to be inapplicable to barter unless otherwise indicated. Thus it has been held in England that barter by a mercantile agent without authority passed no property in his principal's goods, even although the agent

<sup>1</sup> Stair, i. 14, 1.

<sup>2</sup> *Hogarth v. Broomfield*, 1882, 9 R. 964.

<sup>3</sup> Ersk. iii. 3, 4.

<sup>4</sup> For the difference between sale and barter in the civil law, see Benjamin on Sale, 6th ed., pp. 8 and 479.

<sup>5</sup> 56 & 57 Vict. c. 71, ss. 1 (3) and 17.

<sup>6</sup> *Aldridge v. Johnson*, 1857, 7 E. & B. 885.



dealt as principal.<sup>1</sup> On the other hand, in view of the terms of s. 5 of the Factors Act, 1889,<sup>2</sup> it would seem that a mercantile agent may validly pledge his principal's goods by way of barter up to the value of the goods, or other consideration than money, received in exchange.

#### SECTION 4.—IMPLEMENT OF CONTRACT.

**330.** Looking to the modern assimilation between English and Scots law in sale of goods, it may be important to note that in England it has been decided in contracts of barter (1) that if one party fails to implement, the conclusion of any action against him must be for specific implement and not for the price, unless there be a subsequent agreement to pay in money ;<sup>3</sup> (2) if the consideration is partly in goods and partly in money, the conclusion must again be for specific implement ;<sup>4</sup> but (3) in both cases where the consideration in goods is implemented, the money portion may be recovered as in sale.<sup>5</sup>

#### SECTION 5.—HERITAGE.

**331.** When the subjects exchanged are both heritable, the contract is "Excambion." In this case, following the Roman law,<sup>6</sup> eviction from one of the lands exchanged warrants recourse against the other, even in a question with singular successors.<sup>7</sup> See EXCAMBION.

<sup>1</sup> *Guerreiro v. Peile*, 1820, 3 B. & Ald. 616 ; 22 R.R. 500.

<sup>2</sup> 52 & 53 Vict. c. 45, s. 5.

<sup>3</sup> *Harrison v. Luke*, 1845, 14 M. & W. 139, B. Park at p. 141 ; and *Read v. Hutchison*, 1813, 3 Camp. 351.

<sup>4</sup> *Talver v. West*, 1816, Holt, N.P.C. 178 ; and *Read v. Hutchison*, *cit. supra*.

<sup>5</sup> *Sheldon v. Cox*, 1824, 3 B. & C. 420 ; *Bull v. Parker*, 1842, 12 L.J. (Q.B.) 93.

<sup>6</sup> Dig. xix. 4, 13.

<sup>7</sup> Ersk. ii. 3, 28.

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## BEQUEST.

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# BILL CHAMBER.

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## PART I.—HISTORY AND JURISDICTION.

## SECTION 1.—JURISDICTION OF DEPARTMENT.

**332.** The Bill Chamber is the department of the Court of Session charged with (1) the vacation work of the Court; (2) the initiatory proceedings in Notes of Suspension, Suspension and Interdict, and Suspension and Liberation; (3) the granting of Bills and Warrants for Letters passing the Signet, and other steps of diligence; (4) administration of the bankruptcy statutes; (5) petitions remitted to the Junior Lord Ordinary under the Distribution of Business Act; (6) valuation appeals from the Assessor of Railways and Canals, and (7) miscellaneous business under various statutes.

## SECTION 2.—HISTORY.

**333.** On the last day of the first session of the Court of Session, 31st July 1532, an Act of Sederunt was passed anent the administration of justice in time of vacations, as follows: “The quhilk day it is devisit and ordainit anentis the ordouring of justice and ministratioun thereof now in this feriate tyme of harvest, in sic materis as requiris no tabilling; that the Lordis of the Sessioun, sa mony as sall happen to remane in this toun for the said tyme, sall sit and minister justice, quhen sic materis cumes as requiris hasty acceleratioun and expeditioun, and all the Lordis now present hes given and grantit their power to thaim that sall happen to remane, as saide is, and sall appreve the samin as thai war present.”<sup>1</sup> This Act of Sederunt may be considered the origin of the Bill Chamber.

**334.** A later Act of Sederunt, 1555, provides more particularly for its administration, and shows it operating during session as well as during vacation. “It is devisit and ordainit, that, in all tymes cuning, all the billes be deliverit be Johnne Wallace (*the Principal Clerk of the Bills*) allanerlie, on this manner, that is to say, in tyme of Sessioun on the dayis that the Lordis sittis in the Counsalhous; and that all deliverance of billis be his hand writ; and he to answer for the samyn; and that na other writtar have power to wryte ony deliverance thairon

<sup>1</sup> Beveridge, *Forms of Process*, p. 24.

bot he allanerlie ; and that the kepar of the signet answer nocht with the signet to ony lettre givin on ony bill, gif the deliverance of the samyn be nocht writtin be Johnne Wallace allenarlie, and that he at the end of the bill, subscribe the samyn. And on the halydayis and other feriat dayis, when the Lordis sittis nocht in tyme of Sessioun, that outhir the Chancellare, President or Clerk of Register, beand present with thre otheris Senatouris, with ony ane of thame, and in time of vacance siclike, if thair be sa mony in this toun of Edinburgh ; and failzieing of the said nowmer, thai that happynis to be present for the tyme, quhat nowmer that evir thai be of, sall deliver the saidis billis concerning all materis ; for the quhilkis deliverance thai sal be holden to answer ; and that he ressaue na mair of dewtie for deliverance of ony bill bot four pennies ” (*i.e.* a plack) “ allanerlie ; and gif he takis mair thairfoir nor as said is, he to be callit and accusit thairfoir befor the saidis Lordis.” <sup>1</sup>

**335.** The permission to such judges as were in town during vacation to discharge the duties of the Bill Chamber Court not unnaturally led to these being dealt with by one judge, and the practice was later extended to session. An Act of Sederunt of 25th May 1591 mentions that a Lord Ordinary had been appointed weekly to sit in the “ Outer Tulbuith ” for the hearing and decision of actions. At first he no doubt only heard the debate and reported to the Court, by whom alone in session the interlocutor passing or refusing a Bill could be competently pronounced.

**336.** In 1813 it was enacted that the junior judge of the Court of Session should officiate exclusively as Lord Ordinary on the Bills in time of session, and perform the whole duties of the Bill Chamber, but during vacation the whole thirteen Ordinary Lords of Session should officiate as Ordinaries on the Bills in rotation, each a week.<sup>2</sup> The practice was, however, settled by statute in 1826,<sup>3</sup> providing that in all cases without distinction the Lord Ordinary on the Bills may pass Bills of Suspension without requiring the concurrence of the Inner House during session and of one or more ordinaries during vacation. In 1830 <sup>4</sup> the number of judges in the Court of Session was reduced to the present number of thirteen, including the Lord President and Lord Justice-Clerk. Of the eleven Lords Ordinary five were Lords Commissioners of Justiciary, and they were excused from officiating on the Bills in vacation. Since the Criminal Procedure (Scotland) Act of 1887 <sup>5</sup> all the judges of the Court of Session have been also Lords Commissioners of Justiciary, and all now take the Bills in rotation during vacation.

**337.** The name Bill Chamber was derived from the Bills or Bulls granted by the Court. A Bill was a petition addressed to the Lords of Council and Session, setting forth the grounds upon which the petitioner was entitled to have letters sealed with the King’s Signet. These

<sup>1</sup> Beveridge, *Forms of Process*, p. 85.

<sup>2</sup> 53 Geo. III. c. 64, s. 2.

<sup>3</sup> 6 Geo. IV. c. 120, s. 46. <sup>4</sup> 1 Will. IV. c. 69, s. 20.

<sup>5</sup> 50 & 51 Vict. c. 35, s. 44.



Bills were necessary in early practice in certain summonses called privileged summonses, which bore to proceed *ex deliberatione Dominorum Concilii*, and included summonses (1) for which there existed no customary style, (2) in which the King had an interest, and (3) in regard to which the ordinary requisites as to time of citation and order of calling were craved to be dispensed with.<sup>1</sup> A new classification of privileged summons was introduced in 1672,<sup>1</sup> but no Bills have been required on any summons since 1850.<sup>2</sup> Bills were also required as an initiatory step in advocations and suspensions. In suspensions the present form of Note was substituted for the proceeding by Bill and Letters in 1838.<sup>3</sup> In the same year proceedings by Note of Advocation, in place of Bill and Letters, were introduced,<sup>4</sup> and that again was abolished by the Court of Session Act, 1868,<sup>5</sup> when the present form of appeal from the Sheriff Court took its place.

**338.** Bills were also required in various forms of diligence. To a large extent these have been superseded by the provisions of the Personal Diligence Act, 1838,<sup>6</sup> but the old procedure is still competent and in some cases necessary.<sup>7</sup> Bills of this nature were known as plack Bills, from the fee (4 pennies—a plack) formerly charged by the Clerk of the Bills on issuing them.<sup>8</sup> These plack Bills were, until 1813, endorsed by the Clerk of the Bills in token of their being properly vouched by the requisite documents presented to him for examination, but they required the subscription of the Lord Ordinary on the Bills. In that year it was enacted that the endorsation by the Clerk alone should be sufficient.<sup>9</sup> In cases of doubt and difficulty the Clerk may report to the Lord Ordinary, whose subscription is then necessary. The Lord Ordinary may report to the Court.<sup>10</sup> It is curious to note that the form used in granting a Bill, *Fiat ut petitur*, was adopted by our old ecclesiastical judges from the practice of the Vatican, and is the form used by the Pope in authenticating certain Papal Bulls.<sup>11</sup>

### SECTION 3.—THE CLERK OF THE BILLS.

**339.** The Clerk of the Bills, like the principal clerks of Session, was originally appointed by the Lord Clerk Register, but the appointment is now held by commission from the Crown. In 1684 Mr. David Graham was appointed Conjunct Clerk of the Bills, and from that date down to 1857 the duties of the office were performed by two principal clerks of the Bills and their deputies.<sup>12</sup> The Act of 1857, regulating Bill Chamber procedure, provided for one clerk of the Bills, one assistant clerk of the Bills, and two ordinary clerks.<sup>13</sup> When, in 1889, the work of the Junior

<sup>1</sup> Mackay's Manual, p. 6.

<sup>2</sup> Judicature Act, 1850 (13 & 14 Vict. c. 36), s. 18.

<sup>3</sup> 1 & 2 Vict. c. 86, ss. 4, 5 and 6.

<sup>4</sup> 1 & 2 Vict. c. 86, s. 3.

<sup>5</sup> 31 & 32 Vict. c. 100, ss. 64 and 65.

<sup>6</sup> 1 & 2 Vict. c. 114.

<sup>7</sup> Mackay's Manual, p. 7.

<sup>8</sup> A. of S., 1555.

<sup>9</sup> 53 Geo. III. c. 64, s. 17.

<sup>10</sup> *Lamont*, 1867, 6 M. 84.

<sup>11</sup> Ross's Lectures, p. 239.

<sup>12</sup> Beveridge, p. 86; 50 Geo. III. c. 112, s. 44; 1 & 2 Geo. IV. c. 38, ss. 6 and 7.

<sup>13</sup> 20 & 21 Vict. c. 18, ss. 1 and 2.

Lord Ordinary was transferred to the Bill Chamber, the interim assistant clerk in the Junior Lord Ordinary's office was transferred to the Bill Chamber, but it was provided that upon a vacancy occurring it should not be filled up, and the staff of the Bill Chamber should consist of the Clerk of the Bills, an assistant clerk, and an ordinary clerk.<sup>1</sup> It was subsequently found necessary to appoint an additional clerical assistant.

#### SECTION 4.—THE BILL CHAMBER OFFICE.

**340.** The Bill Chamber office occupies Rooms 2 to 8 in the New Register House, Edinburgh. The hours of attendance are: Session, 10 a.m. to 12 noon, and 2 p.m. to 4 p.m.; vacation, 10 a.m. to 12 noon, and 2 p.m. to 3 p.m.; Saturdays, 10 a.m. to 12 noon. During session the Clerk of the Bills attends at the Lord Ordinary's Bar and in Court from 10 o'clock forenoon to 12 noon, and thereafter as long as any Bill Chamber cases require to be attended to there.<sup>2</sup>

#### SECTION 5.—CAUSES ASSIGNED TO BILL CHAMBER.

**341.** By the Court of Session Act of 1830 the jurisdiction of the High Court of Admiralty was transferred to the Court of Session, and it was provided that all applications of a summary nature connected with Admiralty causes may be made to the Lord Ordinary on the Bills.<sup>3</sup> By the Sequestration Act, 1839, proceedings in bankruptcy in the Court of Session were transferred to the Bill Chamber.<sup>4</sup> The office of the Junior Lord Ordinary was conjoined with the Bill Chamber in 1889, and thenceforth petitions falling under the Distribution of Business Act have formed a very important part of the work of the department.

### PART II.—PROCEDURE IN VACATION.<sup>5</sup>

#### SECTION 1.—INNER HOUSE.

**342.** The Lord Ordinary on the Bills in vacation may dispose of all incidental motions in petitions presented to the Inner House, provided that such motions do not, in the case of contentious petitions, involve the merits of the cause.<sup>5</sup> He may further exercise the *nobile officium* of the Court where a case of urgency is shown in such cases as the following:

1. Applications for custody of children.<sup>6</sup>
2. Petitions and complaints for breach of interdict.<sup>7</sup>

<sup>1</sup> 52 & 53 Vict. c. 54, s. 3.

<sup>2</sup> C.A.S., E, i. 1 and 2.

<sup>3</sup> 10 Geo. IV. and 1 Will. IV. c. 69, s. 21.

<sup>4</sup> 2 & 3 Vict. c. 41, ss. 3 and 19; A.S., 21st Dec. 1839; A.S., 15th July 1842.

<sup>5</sup> Maclaren's Bill Chamber Practice, p. 252 *et seq.*; C.A.S., A, i. 3 (b).

<sup>6</sup> *Edgar v. Fisher's Trs.*, 1893, 21 R. 59; *Buchan v. Cardross*, 1842, 4 D. 1268.

<sup>7</sup> *Glasgow International Exhibition v. Sosuowski*, 1901, 39 S.L.R. 28.

3. Rectification of Gazette notices.<sup>1</sup>

4. Appointment of interim officers.<sup>2</sup>

The Lord Ordinary on the Bills also disposes of applications under the Companies Consolidation Act, 1908.<sup>3</sup> The processes remain in the hands of the clerks of the Inner House, and they attend to lay the cases before the Lord Ordinary in the Bill Chamber.

## SECTION 2.—OUTER HOUSE.

**343.** It is competent for the Lord Ordinary on the Bills at each Vacation Court to deal at such Court with every motion which could competently be made in causes depending in the Outer House during session, but the judge shall not be bound to dispose of such motions if, in his opinion, they can conveniently be postponed until the meeting of the Court. This provision shall not be construed as making it competent to deal with the adjustment of records or the adjustment of issues.<sup>4</sup>

**344.** Apart from this special jurisdiction as Vacation Court Judge, the Lord Ordinary on the Bills disposes of applications competent in the Outer House, including petitions and applications :

1. For the protection of married women's property.<sup>5</sup>
2. Under the Trusts Act, 1921.<sup>6</sup>
3. Under the Presumption of Life Act.<sup>7</sup>
4. Under the Companies (Consolidation) Act, 1908.<sup>8</sup>
5. For appointment of arbiters.<sup>9</sup>
6. For possession or specific performance under s. 91 of the Court of Session Act, 1868.<sup>10</sup>
7. For recall of arrestment <sup>11</sup> and inhibition.<sup>12</sup>
8. Under the Taxes Management Act, 1880.<sup>13</sup>
9. For commission and diligence to take evidence to lie *in relentis*.<sup>14</sup>
10. For orders to cite witnesses in Great Britain, but outwith the jurisdiction, to appear before the Court of Session.<sup>15</sup>
11. For orders upon witnesses in Scotland to appear before Commissions granted by English and Irish Courts.<sup>16</sup>
12. Under the Law Agents Act.

<sup>1</sup> *Naismith, Petr.*, 1910, 1 S.L.T. 305 ; cf. *Car Mart, Ltd., Petrs.*, 1924, S.L.T. 146.

<sup>2</sup> Beveridge, *Forms of Process*, p. 228 *et seq.*

<sup>3</sup> 8 Edw. VII. c. 69, s. 135 ; Wilton on Company Law, pp. 248, 249.

<sup>4</sup> 31 & 32 Vict. c. 100, s. 93 ; C.A.S., A, i. 3 (a).

<sup>5</sup> Conjugal Rights (Scotland) Act, 1861, s. 1.

<sup>6</sup> Trusts (Scotland) Act, 1921, s. 26.

<sup>7</sup> Presumption of Life (Scotland) Act, 1891, s. 12.

<sup>8</sup> Companies (Consolidation) Act, 1908, s. 135.

<sup>9</sup> Arbitration (Scotland) Act, 1894, ss. 2 and 6.

<sup>10</sup> 31 & 32 Vict. c. 100, s. 91.

<sup>11</sup> 1 & 2 Vict. c. 114, s. 20.

<sup>12</sup> 31 & 32 Vict. c. 101, s. 158.

<sup>13</sup> 43 & 44 Vict. c. 19, s. 59 (2) ; C.A.S., C, vii. 2 and 4.

<sup>14</sup> A.S., 11th July 1828, s. 117.

<sup>15</sup> 17 & 18 Vict. c. 34, s. 1.

<sup>16</sup> 6 & 7 Vict. c. 82, ss. 5 and 6.

13. Interlocutory matters arising in election petitions.<sup>1</sup>

14. For leave to reclaim, which may, in the absence of the Lord Ordinary whose interlocutor is reclaimed against, be granted by the Lord Ordinary on the Bills.<sup>2</sup>

The clerks of the Outer Houses attend the Lord Ordinary in the Bill Chamber, and write the interlocutors in these applications.

### PART III.—SUSPENSION, SUSPENSION AND INTERDICT, AND SUSPENSION AND LIBERATION.

#### SECTION 1.—GENERAL.

**345.** These proceedings are initiated by Note in the terms or general forms given in the schedules set forth in C.A.S., E, ii. 1, repeated from A.S., 24th December 1838.<sup>3</sup> The Note does not require to be printed. It may be signed by counsel or agent and is presented in the Bill Chamber with the ordinary steps of process—that is, inventory of process, interlocutor sheet, duplicate inventory of process, certified copy Note, and, if any productions are to be lodged at this stage, inventory of productions. Agents sign pleadings in the Bill Chamber and may competently take hearings though the attendance of counsel at these is usual.

**346.** Suspensions are of three classes :

1. Suspensions of decrees *in foro* of inferior Courts.<sup>4</sup>
2. Suspensions of decrees in absence of the Court of Session.<sup>5</sup>
3. All other suspensions, suspension and interdict, and suspension and liberation.<sup>6</sup>

#### SECTION 2.—SUSPENSION OF COURT OF SESSION DECREE.

**347.** Suspension of a decree *in foro* of the Court of Session is incompetent,<sup>7</sup> but in a recent case where a suspension was brought, not to review the merits but to prevent immediate execution of the charge on a decree which the suspender sought to reduce in a separate action of reduction, on the ground that it had been impetrated from the Court by fraud, suspension was found competent and the Note passed and interim sist of execution granted without caution.<sup>8</sup> A decree by default is a decree *in foro*.<sup>9</sup>

**348.** Suspension of a decree in absence of the Court of Session is competent where the reponing days have expired but the decree has not become final or equal to a decree *in foro* or been implemented.<sup>10</sup> The Note is in form C.A.S., E, ii. 1 (b) without any statement of facts. When it is lodged there is consigned the amount of the expenses decerned

<sup>1</sup> 31 & 32 Vict. c. 125, ss. 11, 25 and 58; C.A.S., J, i. 25.

<sup>2</sup> 31 & 32 Vict. c. 100, s. 94.

<sup>4</sup> 1 & 2 Vict. c. 86, s. 4.

<sup>6</sup> 1 & 2 Vict. c. 86, s. 6.

<sup>8</sup> *M'Carroll v. M'Kinstery*, 1923 S.C. 94.

<sup>10</sup> 1 & 2 Vict. c. 86, s. 5; 31 & 32 Vict. c. 100, ss. 23 and 24.

<sup>3</sup> 1 & 2 Vict. c. 86, ss. 4, 5, 6.

<sup>5</sup> 1 & 2 Vict. c. 86, s. 5.

<sup>7</sup> Maclaren, Bill Chamber Practice, p. 80.

<sup>9</sup> *Maule v. Tainsh*, 1878, 6 R. 44.



for in the decree complained of. The Note is forthwith submitted to the Lord Ordinary and passed "in terms of the Act 1 & 2 Vict. c. 86, s. 5." The Note and interlocutor are served upon the opposite party, and after the lapse of fifteen days from the date of service the process may be transmitted to the Lord Ordinary who granted the decree in absence.<sup>1</sup>

### SECTION 3.—SUSPENSION OF DECREE *IN FORO* OF INFERIOR COURT.

**349.** Where it is competent to bring the judgment of an inferior Court under review by suspension (with the exception of a decree of removing), this may be done by lodging in the Bill Chamber a written Note of Suspension, reciting the import and effect of the decree sought to be suspended, and setting forth in the prayer the relief or remedy craved. The form will be found in C.A.S., E, ii. 1, Schedule (a). The presentment of this Note, on being certified by the Clerk, operates as an interim sist of diligence, and on caution being found for implement of the judgment of the inferior Court, including payment of expenses and also for the expenses that may be incurred in the Court of Session, such Note shall be forthwith passed by the Lord Ordinary on the Bills, and certified notice of the Note having been passed being transmitted to the clerk of the inferior Court, the process shall forthwith be transmitted to the Court of Session. The Note and interlocutor passing the same are served upon the opposite party.<sup>2</sup>

**350.** If full caution is not offered, or if the decree sought to be reviewed is a decree of removing, a statement of facts must be annexed to the Note, which will then be in the form given under letter (c) of the said schedule, and the procedure will be the ordinary procedure in Notes of Suspension in that form.<sup>3</sup>

### SECTION 4.—ALL OTHER SUSPENSIONS, SUSPENSION AND INTERDICT, AND SUSPENSION AND LIBERATION.

#### SUBSECTION (1).—*Presentation of Note and First Order.*

**351.** The Note in form (c) of C.A.S., E, ii. 1, is marked by the Clerk of the Bills with the date of lodging and, if no caveat has been lodged by the respondent, it is submitted to the Lord Ordinary forthwith and an order of intimation granted. In the case of an application to suspend a charge and to interdict a sale under a poiding which has followed on the charge, it is necessary to use a combined form of suspension and suspension and interdict.<sup>4</sup>

#### SUBSECTION (2).—*Interim Sist or Interdict.*

**352.** If interim sist or interim interdict or liberation is sought at this stage it is usual for counsel or agent to attend before the Lord

<sup>1</sup> Antonio, p. 5; MacLaren, Bill Chamber Practice, p. 87.    <sup>2</sup> 1 & 2 Vict. c. 86, s. 4.

<sup>3</sup> C.A.S., E, ii. 1 (c).    <sup>4</sup> Jur. Styles, iii. 456; *Hobbin v. Burns*, 1904, 11 S.L.T. 681.

Ordinary to give any information or explanation that may be required. The Clerk of the Bills or one of his deputies must in all cases attend the Lord Ordinary with the Note where an order is to be pronounced.<sup>1</sup>

#### SUBSECTION (3).—*Caveat.*

**353.** If a caveat has been lodged, intimation of the presentation of the Note is at once made to the agent of the caveater by the Clerk of the Bills, and a hearing on the caveat arranged either for a later hour on the day of presentation or for the following day. A caveat is a note or memorandum lodged in the Bill Chamber by any party who is apprehensive of a Note of Suspension, or Suspension and Interdict, etc., being presented against him, and of an interim order being obtained to his disadvantage, requesting that notice may be made to him of any such application before an order is pronounced. (Caveats may also be lodged in the Bill Chamber craving notice of the presentation of petitions for sequestration in bankruptcy.) A caveat endures for one month from its date, but may be renewed. A caveater must be prepared to support his caveat at an hour's notice, and is not entitled to ask delay to obtain further instructions.

#### SUBSECTION (4).—*Service of Note.*

**354.** The usual induciæ on a Note is eight days, but the Lord Ordinary may grant a short induciæ or may extend the induciæ as circumstances require. A copy of the Lord Ordinary's interlocutors is written on the certified copy Note, and the copy Note and interlocutor are certified by one of the Bill Chamber clerks and become the warrant for service. The principal Note cannot be borrowed up.<sup>2</sup> The Note is served upon the respondents in common form by a messenger, or where there is no messenger in the district of the county where the respondent resides, by a sheriff officer,<sup>2</sup> or by a law agent.<sup>3</sup> If the Note is not served within fourteen days of the interlocutor the Note is held to have fallen.<sup>4</sup> When an order is given after hearing on a caveat, service of the Note is not necessary and the caveater is appointed to lodge answers within a fixed time.

**355.** In all cases where interim sist of execution or interim interdict is granted, the sist or interdict must be intimated. Such intimation need not be in any special form or accompanied by any solemnity "provided sufficient is done to substantiate in evidence that the sist or interdict has been on the part of the complainer made known to the party complained of."<sup>5</sup> If along with the order for intimation,

<sup>1</sup> C.A.S., E, ii. 3.

<sup>2</sup> 31 & 32 Vict. c. 100, s. 19.

<sup>3</sup> 45 & 46 Vict. c. 77; *Addison v. Brown*, 1906, 8 F. 443.

<sup>4</sup> *Fraser v. Gordon*, 1834, 12 S. 380; *Maclaren*, Bill Chamber Practice, p. 14.

<sup>5</sup> *Clark v. Stirling*, 1839, 1 D. 955, L. Mackenzie, p. 970; *Beveridge's Bill Chamber*, p. 45; *Scott's Bill Chamber*, pp. 4, 24.

interim sist of execution or interim interdict has been granted on caution, the induciæ on the service or intimation of the Note does not begin to run until the caution has been found and approved by the Clerk of the Bills.<sup>1</sup> Appearance is entered for the respondent by his agent or the agent's clerk signing his name on the Roll of Suspensions kept in the Bill Chamber, and this must be done before the process is borrowed by the agent.

SUBSECTION (5).—*Procedure where no Appearance for Respondent.*

**356.** On the expiry of the induciæ, the execution of service having been lodged, if no appearance has been entered for the respondent and no answers lodged by him, the cause may be enrolled before the Lord Ordinary, and he may pass the Note, and immediately on passing pronounce a final judgment in whole or in part, granting the prayer of the Note and disposing of expenses.<sup>2</sup> This final judgment in absence, however, is not to be regarded as a Bill Chamber decree, but as a decree of the Court of Session, and is extractable by the Extractor of the Court of Session and not by the Clerk of the Bills.<sup>3</sup>

SUBSECTION (6).—*Procedure where Answers Lodged.*

**357.** Where answers are lodged in reply to the Note a hearing is fixed for an early day unless the agents intimate that both parties consent to the Note being passed and are in agreement regarding the granting or refusing of interim sist or interdict. Such consent is usually expressed in a joint letter by the agents addressed to the Clerk of the Bills. After hearing parties on the Note and answers, the Lord Ordinary on the Bills passes the Note without caution, or on caution or consignation, or on such other conditions as may seem just, and grants or refuses interim sist of execution or interim interdict or liberation, or if he is satisfied that there is no question of fact or law suitable for trial in the Court of Session he refuses the Note.<sup>4</sup> An interlocutor refusing a Note cannot be used to found a plea of *res judicata*.<sup>5</sup>

**358.** It has been held competent at the hearing on answers to allow the pleadings to be amended in terms of C.A.S., B, i. It is competent for the Lord Ordinary on the Bills to award expenses and to decide all questions relating thereto in processes of suspension, interdict, suspension and interdict, and suspension and liberation depending in the Bill Chamber to the same effect as if such actions had been transmitted to the Court of Session.<sup>6</sup>

**359.** Where the respondent, whether before or after the institution of proceedings, shall have done any act which the Court in the exercise of its preventive jurisdiction might have prohibited by interdict, the

<sup>1</sup> C.A.S., E, ii. 6.

<sup>2</sup> *Ibid.*, E, ii. 25.

<sup>3</sup> *Ibid.*, E, ii. 25.

<sup>4</sup> *Watson v. Neuffert*, 1863, 1 M. 1110; L. J.-C. Inglis, p. 1114; *Waddell v. Howat*, 1924, S.L.T. 468; 1925 S.C. 484.

<sup>5</sup> *Richardson's Trs. v. Ballachulish Slate Quarries, Ltd.*, 1918, 1 S.L.T. 413.

<sup>6</sup> C.A.S., E, ii. 23.



Lord Ordinary on the Bills upon a prayer to that effect in the Note, or in a supplementary Note, may ordain such respondent to perform any act which may be necessary for reinstating the complainer in his possessory right or for granting specific relief against such illegal act.<sup>1</sup>

**360.** The Lord Ordinary in the Bill Chamber cannot take oral evidence regarding disputed facts, but he may examine written documents and may remit to a man of skill to examine and report before determining the question of interim interdict.<sup>2</sup> It is of doubtful competency, unless of consent of parties, to sist process in the Bill Chamber, and this ought only to be done after the Note has been passed and the cause transmitted to the Outer House.<sup>3</sup>

**361.** When an order is pronounced refusing a Note of Suspension of a judgment of an inferior Court proceeding on a proof, the interlocutor must distinctly specify the several facts material to the case which the Lord Ordinary finds to be established by the proof, and express how far his judgment proceeds on the matter of fact so found or on the matter of law, and the several points of law which he means to decide.<sup>4</sup>

SUBSECTION (7).—*Report by Lord Ordinary on the Bills to Division, etc.*

**362.** When difficulty arises as to procedure the Lord Ordinary on the Bills may report the cause verbally to the Division, who may direct him how to proceed.<sup>5</sup> The interlocutor pronounced by the Division shall be considered as a judgment of the Inner House, and be signed by the Lord President of the Division.<sup>6</sup> Where an application is made to the Lord Ordinary on the Bills arising out of an action depending in the Court of Session, he may report to the Division or to the Lord Ordinary before whom the action is depending, and order the Note, answers, and productions, if any, to be printed for the use of the Division or Lord Ordinary.<sup>7</sup>

SUBSECTION (8).—*When Interlocutor passing Note becomes Effective.*

**363.** An interlocutor passing a Note does not take effect until forty-eight hours after such interlocutor has been entered in the minute book, except as a continuance of sist or interdict where the interdict

<sup>1</sup> 31 & 32 Vict. c. 100, s. 89; *Clippens Oil Co., Ltd. v. Edinburgh & District Water Trust* 1898, 25 R. 370.

<sup>2</sup> *Scott v. Leith Police Commissioners*, 1830, 8 S. 845; *Baird v. Monkland Iron Co.*, 1862, 24 D. 1418; Mackay's Manual, p. 421.

<sup>3</sup> *Clippens Oil Co., Ltd. v. Edinburgh & District Water Trust*, 1906, 8 F. 731, L. P. Dunedin, p. 750; *M'Carroll v. M'Kinstry*, 1923 S.C. 94.

<sup>4</sup> C.A.S., E, ii. 19; 6 Geo. IV. c. 120, s. 40.

<sup>5</sup> A.S., 11th July 1828, s. 119; *Tod v. North British Rly. Co.*, 1846, 8 D. 726, at p. 743; *M'Connachie*, 1914 S.C. 853.

<sup>6</sup> C.A.S., D, i. 6; *Tod v. North British Rly. Co.*, *supra*.

<sup>7</sup> C.A.S., E, ii. 24.



has been continued. Further, in cases where caution has to be found after the passing of the Note, the interlocutor shall not take effect until caution has been found.<sup>1</sup>

SUBSECTION (9).—*Suspensions of Decrees in Absence under £12.*

**364.** In the case of suspensions of decrees in absence under £12 of inferior Courts, other than the Sheriff Court, it is provided that the Lord Ordinary shall refuse the Note and remit to the inferior judge, if he be competent, the defender always before being heard on his defences in the inferior Court paying to the pursuer, or consigning in the hands of the clerk of said inferior Court, the expense incurred by the pursuer in the first process, decree, and charge thereon, and also the expense incurred in the Bill Chamber as the latter shall be modified by the Lord Ordinary on the Bills. Such remit shall not import a sist of diligence unless the Note and remit be intimated to the charger and lodged with the clerk of the inferior Court. After the Note and remit have been intimated and lodged, the charger may again insist in his action without the necessity of new citation, and the inferior judge is directed to proceed and determine therein.<sup>2</sup>

SUBSECTION (10).—*Suspensions in Cases not exceeding £50.*

**365.** Suspensions of charges or threatened charges upon decrees of the Sheriff Court granted by the Sheriff, or upon decrees of registration proceeding upon bonds, bills, contracts, or other obligations registered in the books of the Sheriff Court, the Books of Council and Session, or any others competent, where the debt, exclusive of interest and expenses, does not exceed £50, are now competent in the Sheriff Court and may not be brought in the Bill Chamber.<sup>3</sup>

SUBSECTION (11).—*Wakening.*

**366.** When no proceedings have been taken on a Note for a year and day it is held to be asleep. The Note may be awakened or revived by presenting a written Note to the Lord Ordinary on the Bills duly intimated to the opposite party, or his known agent, fifteen days at least previous to laying the Note before the Lord Ordinary. A certificate of intimation must be produced along with the Note.<sup>4</sup> Interim sist, or interim interdict subsists though the process may be asleep.<sup>5</sup>

<sup>1</sup> C.A.S., E, ii, 21.

<sup>2</sup> *Ibid.*, E, ii, 4; Maclaren, Bill Chamber Practice, p. 92.

<sup>3</sup> 7 Edw. VII. c. 51, s. 5 (5), s. 7, First Schedule, 123–125; *Bryson v. Belhaven Engineering and Motors, Ltd.*, 1908, 15 S.L.T. 1043; *Aitchison v. McDonald*, 1911 S.C. 174; *Maule & Son v. Page & Co.*, 1909, 47 S.L.R. 110; *Pagan & Osborne v. Haig*, 1910, 1 S.L.T. 122.

<sup>4</sup> A.S., 8th July 1831, s. 5; Maclaren, B.C.P., p. 40.

<sup>5</sup> *Low v. Campbell*, 1824, 3 S. 265; *Beattie v. Stodart*, 1836, 16 S. 906; *American Mortgage Co. v. Sidway*, 1906, 44 S.L.R. 170.

SUBSECTION (12).—*Certificate of Passing or Refusing Note.*

**367.** When a Note is passed or refused in the Bill Chamber no formal extract is issued, but a certificate of passing or refusing of the Note may be issued forty-eight hours after the entry in the Bill Chamber minute book of the interlocutor passing or refusing the Note.<sup>1</sup> The Lord Ordinary may on cause shewn, and on such conditions as may appear reasonable, prohibit the issue of such certificate to enable the party concerned to obtain a review of the interlocutor.<sup>2</sup>

SUBSECTION (13).—*Interim Sist of Execution, Interim Interdict, and Interim Liberation.*

**368.** When interim sist of execution, interim interdict, or interim liberation is granted, whether in the first interlocutor or in the interlocutor passing the Note without caution, the order takes effect on intimation.<sup>3</sup> When interim sist of execution is granted on caution or consignation it is doubtful whether the sist takes effect on intimation or only on caution being found or consignation made.<sup>4</sup> In regard to interim interdict on caution it has been decided that the order only takes effect on caution being found.<sup>5</sup>

**369.** An intimated sist stops poinding,<sup>6</sup> imprisonment,<sup>7</sup> or removing,<sup>8</sup> but not arrestment, inhibition, or adjudication<sup>9</sup> nor the granting of a warrant to cite in a petition for sequestration.<sup>10</sup> It stops the running of the days of charge while it endures,<sup>11</sup> but when it is recalled the days of charge proceed to run as if there had been no interruption.<sup>12</sup>

**370.** An interim sist of execution contained in the first interlocutor subsists until the cause is heard on answer, and if it is granted without caution, and the Note is passed and the sist continued on caution, it subsists during the fourteen days allowed for finding caution.<sup>13</sup> When at the hearing on answer the Note is passed and the interim sist continued in terms of the first interlocutor, *i.e.* without caution or on caution already found or consignation already made, or in the case just mentioned when the interim sist is continued, but only on caution, and caution is found, the sist endures until recalled or until the final disposal of the cause in the Court of Session. Interim interdict or interim liberation, granted either in the first interlocutor or at the passing of the Note, when the conditions, if any, are implemented, subsists until

<sup>1</sup> C.A.S., E, ii. 21.<sup>2</sup> *Ibid.*, E, ii. 29.<sup>3</sup> Maclaren, B.C.P., p. 15.<sup>4</sup> A.S., 3rd July 1677; Maclaren, B.C.P., p. 15.<sup>5</sup> *Wilson v. Gilchrist*, 1900, 2 F. 391.<sup>6</sup> *Stewart v. Stewart*, 1751, Mor. 10535; *Keltie v. Wilson*, 1828, 7 S. 208.<sup>7</sup> *Graham Stewart on Diligence*, p. 755.<sup>8</sup> *Tait v. Gordon*, 1828, 6 S. 1056.<sup>9</sup> *Clyne v. Murray*, 1831, 9 S. 338.<sup>10</sup> *Train v. Steven*, 1904, 7 F. 47.<sup>11</sup> *Laird v. Scott*, 1913, 2 S.L.T. 409.<sup>12</sup> *Clark v. Monteith*, 1885, 12 R. 939; Maclaren, Bill Chamber Practice, p. 17.<sup>13</sup> Maclaren, B.C.P., p. 17; *Cassells v. Sillers*, 1910, 2 S.L.T. 447; A.S., 3rd July 1677, ut see C.A.S., E, ii. 21.

recalled or until the final disposal of the cause in the Court of Session.<sup>1</sup>

SUBSECTION (14).--*Refusal of Note on Failure to find Caution.*

**371.** When the interlocutor ordering intimation of a Note contains an interim sist of execution or interim interdict on caution, the time allowed for answering the Note only begins to run from the date when caution is received ; and further, if caution is not received within fourteen days, the Note may be refused.<sup>2</sup> In the event of caution not being found within the prescribed days, the respondent should lodge a Note stating the facts and craving the Court to recall the interim sist or interdict and to refuse the Note in respect of failure to find caution and to grant expenses against the complainer. The Note must be intimated to the complainer, and twenty-four hours thereafter the Lord Ordinary may issue an interlocutor in the terms craved.<sup>3</sup>

**372.** If answers have been lodged before the expiry of the days for finding caution, the respondent may without lodging a separate Note enrol the cause before the Lord Ordinary, and the enrolment having been duly intimated, obtain a like order. A certificate of refusal of the Note may then be issued, but not until forty-eight hours after the entry in the minute book of the interlocutor refusing the Note.<sup>4</sup>

**373.** When a Note of Suspension or Suspension and Interdict is passed on caution or on other condition, and caution is not found or the condition is not purified within the prescribed period (fourteen days from the date of the interlocutor passing the Note), the respondent may intimate to the complainer's agent his intention of applying to the Clerk of the Bills for a certificate of no caution or non-implement. The complainer may in the meantime lodge a Note for prorogation of the time for finding caution, or for an order prohibiting the issue of a certificate of no caution by the Clerk of the Bills. If no such Note is lodged by the complainer or if it is refused, the respondent may lodge a copy of the Note of Suspension or Suspension and Interdict, without statement of facts, and of the interlocutor passing the Note on caution, both certified by the Clerk of the Bills or one of his assistants and bearing certificate of intimation thereon by the agent.<sup>5</sup> On this certified copy Note the Clerk of the Bills will write a certificate of no caution or non-implement. Such certificate may not be issued until twenty-four hours after the date of intimation, and in practice this period is always extended to forty-eight hours.

**374.** Even after the certificate of no caution has been issued, but before a decree for expenses has been pronounced by the Lord Ordinary,

<sup>1</sup> Maclaren, B.C.P., pp. 65, 66 ; *Home Drummond v. M'Lachlan*, 1908 S.C. 12 ; *Clippens Oil Co. Ltd., v. Edin. District Water Trust*, 1906, 8 F. 731, per L. P. Dunedin at p. 749.

<sup>2</sup> C.A.S., E, ii. 6.

<sup>3</sup> *Ibid.*, E, ii. 5 ; Maclaren, B.C.P., p. 27.

<sup>4</sup> Maclaren, B.C.P., p. 27 ; C.A.S., E, ii. 21.

<sup>5</sup> C.A.S., E, ii. 22 ; *Nairne v. Spence*, 1824, 3 S. 228 (N.E. 160).



it is still competent to move the Court to recall the certificate and allow the Clerk to receive a bond of caution. This was done in a case where a bond had been timeously lodged, but objected to and transmitted to Ross-shire to be attested. Owing to a mistake it was delayed in return until the morning after the expiry of the fourteen days. The Clerk was satisfied by the attestation of the sufficiency of the bond.<sup>1</sup> In another case, however, where no sufficient excuse was given and a certificate was issued on the forenoon of the fifteenth day a similar motion was refused.<sup>2</sup>

**375.** A certificate of no caution having been granted by the Clerk, a marking is made to that effect on the interlocutor sheet. The cause may then be enrolled to move the Lord Ordinary to find the complainer liable in expenses. After this interlocutor is issued the Lord Ordinary is *functus*, and no Note for recall of the certificate and permission to find caution or to implement any other condition can be entertained by him,<sup>3</sup> nor is it competent to reclaim. The only remedy open to the complainer is a second Note in terms of C.A.S., E, ii. 20.<sup>4</sup> The Lord Ordinary is sometimes spoken of as being *functus* when the Note is passed, and this is true in the sense that he cannot take further action on the Note, and grants expenses, in the case of failure to find caution just dealt with, not on the Note but on the certificate of no caution; but it has been held that an interlocutor passing a Note on caution is so far suspensive as to entitle him to sist the executors of a respondent who has died after the date of the interlocutor and before caution has been found.<sup>5</sup>

#### SUBSECTION (15).—*Marking of Passed Note.*

**376.** The Note having been passed, and caution, if ordered, having been duly found, or any other condition implemented, the complainer has the right to mark the Note to the Division and Lord Ordinary before whom the further proceedings in the cause are to take place, but subject to this exception "that in every process of suspension of any charge or threatened charge, and in every suspension of a decree, and in every process of interdict where interdict has been granted in the Bill Chamber and is unrecalled, it shall be lawful for the respondent in such process, so soon as the Note of Suspension or Suspension and Interdict is passed, and at any time not later than the twelfth day from the date of the interlocutor passing the same, or in the case of a suspension of a decree not later than the twelfth day from the date of service of the Note of Suspension and interlocutor passing the same upon the respondent, to fix the Lord Ordinary and Division of the Court of Session to which such process shall belong, unless where such Note of Suspension

<sup>1</sup> *Harper v. Balfour*, 1832, 10 S. 248.

<sup>2</sup> *Bain v. Gordon*, 1833, 11 S. 307; see also *Dutch v. Webster*, 1834, 13 S. 225; *Andrew v. Colquhoun*, 1853, 15 D. 482; *Cassells v. Sillers*, 1910, 2 S.L.T. 447.

<sup>3</sup> *Cassells v. Sillers*, 1910, 2 S.L.T. 447, at p. 448. <sup>4</sup> *Purdie v. Bryson*, 1861, 24 D. 85.

<sup>5</sup> *Macalister v. M'Clelland*, 1864, 38 Scot. Jur. 399; 2 S.L.R. 38.



or Note of Suspension and Interdict has been passed on review by or on advising with either Division of the Court, in which case the process shall be fixed throughout with that Division of the Court.<sup>1</sup> If this right granted to the respondent to mark is not exercised it is lost, and the complainer is entitled to mark on the expiry of the reclaiming days.<sup>2</sup> The marking is done by endorsement on the passed Note of the name of the Lord Ordinary and the Division, dated and signed by the agent of the marker. But in a suspension dealing with any cause or matter connected with the Exchequer the Note on being passed shall be transmitted to the Lord Ordinary in Exchequer causes.<sup>3</sup>

#### SECTION 5.—SECOND NOTE OF SUSPENSION, ETC.

**377.** When any Note of Suspension, Suspension and Interdict, or Suspension and Liberation is refused in respect that caution has not been offered or found, or upon any ground not on the merits: and likewise where any such Note shall have been passed and a certificate of no caution or consignment or other failure to implement any condition has been issued, it is competent (except where after amendment of the first Note, to the effect of offering caution or consignment, the Note has been refused for failure to find caution or to consign)<sup>4</sup> on payment of the previous expenses to present a second Note.<sup>5</sup>

**378.** A second Note is also competent where there has been a change of circumstances, even though the first may have been disposed of on the merits, and in such case the provision regarding payment of previous expenses does not apply; but it may be imposed by the Lord Ordinary as a condition of passing the Note. The following are instances of what has been regarded as sufficient change of circumstances to render a second Note competent: execution of diligence by imprisonment and the change of the Note of Suspension to suspension and liberation;<sup>6</sup> execution of diligence by poinding and change of suspension to suspension and interdict;<sup>7</sup> reference to oath added in second Note;<sup>8</sup> new and continued acts since the date of the first Note.<sup>9</sup>

#### SECTION 6.—CAUTION.

##### SUBSECTION (1).—*Bond of Caution.*

**379.** When caution is ordered it is the duty of the complainer to hand to the Clerk of the Bills the names and designations of the proposed

<sup>1</sup> 13 & 14 Vict. c. 36, s. 33; *Toni Tyres v. Palmer Tyres*, 1904, 12 S.L.T. 43; *Bennet v. Bruce*, 1894, 2 S.L.T. 340.

<sup>2</sup> 31 & 32 Vict. c. 100, s. 90.

<sup>4</sup> C.A.S., E, ii. 16.

<sup>6</sup> *Haig, etc. v. Service, etc.*, 1832, 11 S. 145; *Barr v. Wotherspoon*, 1850, 13 D. 305.

<sup>7</sup> *Stewart v. Ferguson*, 1841, 3 D. 668.

<sup>8</sup> *Aitchison v. M'Donald*, 1823, 2 S. 478; *Allan v. Wilkie*, 1854, 16 D. 917.

<sup>9</sup> *M'Kenzie v. Johnstone*, 1831, 10 S. 24; Mackay's Manual, p. 441; Maclaren, B.C.P., pp. 44, 45.

<sup>3</sup> 19 & 20 Vict. c. 56, s. 21.

<sup>5</sup> *Ibid.*, E, ii. 20.

cautioner and attestor. The Clerk then prepares the bond of caution and delivers it to the agent for the complainer in order that it may be executed and a certificate appended by a justice of the peace, to the effect that the cautioner and attestor are each habit and repute responsible for the obligations therein contained.<sup>1</sup> The cautioner is taken bound equally with the principal to pay or to perform respectively to the charger (respondent) or to any other person unto whom payment or performance shall be decreed to be made by the decree to follow in the cause.<sup>2</sup> The attestor is bound as cautioner for the cautioner, and liable *subsidiarie* as fully as the cautioner himself. The bond covers also the expenses of the litigation and, in the case of suspension and interdict, damages for wrongous interdict.<sup>3</sup> The bond is returned to the Clerk signed and with the necessary information for completing the testing clause. The return of the bond must be intimated by the agent lodging to the agent of the opposite party, and the latter must be allowed an opportunity of examining the bond and stating any objection thereto to the Clerk of the Bills.

#### SUBSECTION (2).—*Sufficiency of Caution.*

**380.** By the Bill Chamber Procedure Act of 1857 the Clerk of the Bills is made responsible for the reputed solvency of the cautioners, but this has been interpreted to mean only for the bond of caution being *ex facie* legally executed.<sup>4</sup> It is certainly part of his duty to exercise a general supervision over the finding of caution and to decide upon any objections made to the sufficiency of caution. He is not responsible if the caution should turn out insufficient or if the signature of the cautioner is forged.<sup>5</sup> The Court will not usually interfere with the discretion of the Clerk of the Bills in judging of the sufficiency of caution.<sup>6</sup> A cautioner and an attestor are parties to the cause, and are entitled without finding caution to appear for their own interest and take up the case.<sup>7</sup>

#### SUBSECTION (3).—*New Caution.*

**381.** In every case of suspension of a liquid obligation in which caution has been found it is competent to the party entitled to the benefit thereof, in case the cautioner shall have been sequestrated or become notour bankrupt or have executed a trust disposition for behoof of his creditors or have called a meeting of his creditors to consider the state of his affairs or have died unrepresented, to present a Note stating the circumstances which have emerged, and praying the Division in which

<sup>1</sup> C.A.S., E, ii. 11.

<sup>2</sup> *Ibid.*, E, ii. 8, 9, and 10.

<sup>3</sup> *Ibid.*, E, ii. 7; *Buchan v. Douglas*, 1851, 13 D. 547; *Knox v. Paterson*, 1861, 23 D. 1263.

<sup>4</sup> 20 & 21 Vict. c. 18, s. 1; *Maclaren*, B.C.P., p. 26.

<sup>5</sup> *Simpson v. Fleming*, 1860, 22 D. 679.

<sup>6</sup> *Gow v. Napier*, 1832, 10 S. 812.

<sup>7</sup> *Potter v. Bartholomew*, 1847, 10 D. 97, per L. J.-C. Hope at p. 100, per L. Moncreiff at p. 108; *Henderson v. Young*, 1828, 7 S. 142; *Stewart v. Hickman*, 1843, 6 D. 151; *Addison v. Brown*, 1910, 1 S.L.T. 185.

the proceeding may for the time depend to order new caution to be found, and the Division shall pronounce such order thereon as the justice of the case shall require.<sup>1</sup> Such an application has the effect of setting free the original cautioner.<sup>2</sup>

SUBSECTION (4).—*Juratory Caution.*

**382.** Where a complainer is unable to find caution or to consign, he may offer juratory caution—that is, he may offer a disposition and assignation of his estate in place of caution, and be required to depone on oath regarding the extent of his estate. Juratory caution may be offered in the original Note or by amendment. In the interlocutor ordering juratory caution the Lord Ordinary names a commissioner to take the complainer's deposition. The complainer's agent intimates the diet fixed by the commissioner to the opposite party in order that he may have an opportunity of cross-examining the complainer regarding his estate.

**383.** The complainer lodges with the Clerk of the Bills (1) the bond of caution ; (2) a full inventory of his subjects and effects of every kind ; (3) an enactment subjoined to the inventory bearing that he will not dilapidate any of his property, and that he will not dispose of the same, or uplift any of the debts due to him, without consent of the opposite party or his agent or the authority of the judge (under pain of imprisonment or being otherwise punished as being guilty of fraud), till the suspension be discussed and till there be an opportunity of doing diligence for any expenses that may ultimately be found due by him. The complainer must also lodge with the Clerk the vouchers of any debts due to him and the title deeds of any heritable subjects belonging to him, and, if required, at the respondent's expense, grant a special disposition and assignation of his property for the respondent's security, and the said disposition and assignation with the said vouchers and title deeds shall remain in the hands of the Clerk subject to the directions of the Court till the suspension be discussed.<sup>3</sup>

SUBSECTION (5).—*Consignation.*

**384.** Except in a few cases where consignation is required by statute or custom, it may be offered as an alternative to caution. It is usually for the amount charged for alone, and is not required to cover expenses.<sup>4</sup> In suspensions on consignations the same procedure shall be observed as is provided by the fourth section of 1 & 2 Vict. c. 86 for suspensions without caution or on juratory caution.<sup>5</sup>

<sup>1</sup> C.A.S., E, ii. 12.

<sup>2</sup> *Eadie v. Smith*, 1833, 11 S. 415.

<sup>3</sup> C.A.S., E, ii. 13 ; *Stair*, iv. 52, 26.

<sup>4</sup> *Peddie v. Davidson*, 1856, 18 D. 1306 ; *Maclaren*, B.C.P., pp. 32–33.

<sup>5</sup> C.A.S., E, ii. 26.



SUBSECTION (6).—*Caution by Respondent.*

**335.** If it appears to the Lord Ordinary that interim interdict might occasion hardship and loss to the respondent or to third parties which could not be met by caution found by the complainer, he may refuse interim interdict on caution by the respondent for any loss that may be occasioned to the complainer. This course has been adopted in cases of infringement of patent, and is generally accompanied by an undertaking by or order upon the respondent to keep accounts.<sup>1</sup>

## SECTION 7.—RECLAIMING NOTE.

**336.** Any interlocutor of the Lord Ordinary on the Bills may be brought before the Inner House by Reclaiming Note without leave.<sup>2</sup> The Reclaiming Note must be intimated to the opposite agent and the Clerk of the Bills within fourteen days of the interlocutor reclaimed against, and in session marked by the clerk of the Division<sup>3</sup> and boxed within the said fourteen days, and in vacation marked and boxed on the first box day, or if no box day intervenes, on the first sederunt day thereafter. The reclaimer may mark the Reclaiming Note to either Division even if the Note of Suspension has already been marked on passing, that marking having no effect until the interlocutor passing the Note has become final.<sup>4</sup>

**337.** The Reclaiming Note must be printed and boxed, and a print of the Note, statement of facts, note of pleas-in-law, and answers be printed as an appendix and boxed and lodged with the Reclaiming Note, and where the Reclaiming Note is against an interlocutor remitting to an inferior Court, with instructions, and in all suspensions of final judgments of inferior Courts, the summons and defences or record, if any, in the inferior Court must also be printed.<sup>5</sup>

**338.** A Reclaiming Note against an interlocutor awarding expenses in respect of a certificate of no caution is incompetent as the Note is out of Court.<sup>6</sup> A second Note of Suspension is the only remedy.

**339.** Where the reclaiming days have been allowed to expire through inadvertence it is competent with the leave of the Lord Ordinary to reclaim for the purpose of being reponed, but only on payment of expenses previously incurred by opposite party in the Bill Chamber.<sup>7</sup>

**390.** A Reclaiming Note neither prevents the Clerk of the Bills from issuing the passed Note or a certificate of refusal, as the case may be, nor hinders the interlocutor submitted to review from being carried

<sup>1</sup> Maclaren, B.C.P., p. 70 ; *Macnee v. Black*, 1855, 17 D. 837 ; *Incandescent Gas Light Co., Ltd. v. M'Culloch*, 1897, 5 S.L.T. 180.

<sup>2</sup> C.A.S., E, ii. 29.

<sup>3</sup> *Plock & Logan v. Wallace*, 1841, 4 D. 34.

<sup>4</sup> *Graham v. North British Bank*, 1849, 11 D. 1165.

<sup>5</sup> C.A.S., E, ii. 30.

<sup>6</sup> *Purdie v. Bryson*, 1861, 24 D. 85.

<sup>7</sup> 48 Geo. III. c. 151, s. 16 ; *Arnot v. Thomson*, 1826, 4 S. 427 (N.E. 432) ; *Bennet v. Pyper*, 1833, 11 S. 414.



into effect by the opposite party, unless the Lord Ordinary on the Bills shall stay proceedings, on special cause shewn by a Note for the party, by prohibiting the delivery of the Note or the issue of the certificate, on such terms and conditions and during such time as he may judge reasonable, for enabling the party to obtain a review of the interlocutor.<sup>1</sup>

#### SECTION 8.—APPEAL TO HOUSE OF LORDS.

**391.** An appeal to the House of Lords is competent against a judgment pronounced by the Inner House upon review of the interlocutor of a Lord Ordinary on the Bills or upon report of a case from the Bill Chamber.<sup>2</sup>

#### SECTION 9.—EXTRACTS.

**392.** In purely Bill Chamber proceedings<sup>3</sup> and in Bankruptcy<sup>4</sup> proceedings the Clerk of the Bills is his own extractor, except in the case of a final decree in a suspension, or suspension and interdict, or suspension and liberation, in which the respondent does not appear or lodge answers, pronounced under C.A.S., E, ii. 25. The practice is for the Clerk not to issue extract until the fourteen days allowed for reclaiming have expired. In petitions under the Distribution of Business Act all interlocutors are transmitted to the Extractor of the Court of Session for extract.

### PART IV.—BILLS FOR SIGNET LETTERS.

**393.** As already stated, Bills for Signet Letters, to a great extent, have been rendered unnecessary though not incompetent by the provisions of the Personal Diligence Act, 1838,<sup>5</sup> and the Court of Session Act, 1868,<sup>6</sup> and where they are used when the simpler forms introduced by the Personal Diligence Act are applicable, the expense incurred, except the expense of extract, cannot be recovered.<sup>7</sup> There are, however, numerous cases in which they are still required. The forms will be found in the style books.<sup>8</sup>

#### SECTION 1.—THE BILL.

**394.** A Bill is a petition addressed to the Lords of Council and Session setting forth the grounds on which the petitioner is entitled to have letters signeted, referring to the documents which instruct this, where documents are required, and ending with a prayer for the particular letters of diligence wanted.

<sup>1</sup> C.A.S., E, ii. 29.

<sup>2</sup> Maclaren, B.C.P., p. 44; Beveridge on Bill Chamber, p. 119, s. 560; *Fleming v. Dunlop*, 1839, M'L. & Rob. 547.

<sup>3</sup> Mackay's Manual, p. 315.

<sup>4</sup> *Ibid.*, p. 315; C.A.S., E, ii. 27.

<sup>5</sup> 1 & 2 Vict. c. 114.

<sup>6</sup> 31 & 32 Vict. c. 100, s. 18.

<sup>7</sup> 1 & 2 Vict. c. 114, s. 8.

<sup>8</sup> Jur. Styles, vol. iii. tit. ii. Diligence.

**395.** The form of the Bill is as follows :

“ My Lords of Council and Session, unto your Lordships humbly shews your servitor A. (design), complainer, that (here narrate *verbatim* the ground of debt or other warrant as in the letters, changing only ‘ the Books of our Council and Session,’ where these words occur, to ‘ your Lordships’ Books,’ and ‘ a decree of the Lords thereof ’ to ‘ a decree of your Lordships,’ then say) as the said bond (or bill, registered protest, extract decree, or libelled summons, as the case may be) here to shew will testify.

“ Herefore the complainer beseeches your Lordships for letters of arrestment (or as the case may be) at his instances in the premises in common form.

“ According to justice, etc.

Y.Z.’s Bill.”

This Bill is not signed, but bears the name of the writer to the Signet who signs the letters.

#### SECTION 2.—THE FIAT.

**396.** The Bill is presented in the Bill Chamber along with the letters signed by a writer to the Signet, and with the documents necessary to instruct the petitioner’s right. The Clerk of the Bills after examination, if he be satisfied that the application is in order and that there is no legal cause to the contrary, passes the Bill at once by writing a deliverance upon it in this form, “*Fiat ut petitur*,” adding, where documents are produced, “because the Lords have seen the dependence,” or as the case may be. In cases of doubt or difficulty the Clerk may report to the Lord Ordinary on the Bills,<sup>1</sup> who in that case signs the *fiat*, and the Lord Ordinary may report to the Court.<sup>2</sup> In applications for fiats on Bills for letters of arrestment or inhibition on the dependence of a process, the Clerk of the Bills shall accept, as sufficient warrants for such fiats, copies certified by the Clerk to the process in lieu of the principal summonses, initial writs, interlocutors, or other steps of process.<sup>3</sup> The Bill when the *fiat* has been endorsed becomes the warrant for the signeting of the letters. It is presented along with the letters at the Signet Office and retained by the officer there.

#### SECTION 3.—THE LETTERS.

**397.** All signet letters passing on Bills bear the date of the deliverance on the Bill, the actual date of signeting, if different, being marked on the margin. The narrative in the Bill and in the letters should exactly correspond.

##### SUBSECTION (1).—*Letters of Inhibition.*<sup>4</sup>

**398.** A short form of Letters of Inhibition is given in Schedule (Q Q) to the Titles to Land Consolidation (Scotland) Act, 1868, and the mode

<sup>1</sup> 53 Geo. III. c. 64, s. 17.

<sup>2</sup> *Lamont*, 1867, 6 M. 84.

<sup>3</sup> C.A.S., E, iii. 2.

<sup>4</sup> *Jur. Styles*, iii. 271 ; *Scots Style Book*, v. 92.

of obtaining warrants as stated above applied to that form by A.S., 18th Nov. 1871.<sup>1</sup> Inhibition may proceed upon a decree of the Supreme or of an inferior Court (but not upon decrees of the Small Debt Court<sup>2</sup> or Debts Recovery Court<sup>3</sup>), or upon a liquid document of debt recorded or unrecorded, or upon a signeted summons or depending process in the Court of Session, or upon a depending process in the Sheriff Court. The conclusion of a summons on which inhibition is sought must be of such a nature as may competently be secured by inhibition, and a conclusion for expenses is not sufficient.<sup>4</sup> Inhibition on future or contingent debts is only competent when the debtor is *vergens ad inopiam*.<sup>5</sup> Inhibition is competent on a process depending by appeal in the House of Lords.<sup>6</sup> A defender cannot inhibit on the dependence; but inhibition on a decree for expenses which has become final has been held competent,<sup>7</sup> but not during the running of the reclaiming days, unless upon an averment that the debtor is *vergens ad inopiam*.<sup>8</sup> Inhibition at the instance of a husband against a wife, inhibiting her from incurring debts, she being otherwise provided for, does not require production of any warrant.

**399.** *Recall of Inhibition.*<sup>9</sup>—Inhibition on a depending summons may be recalled by the Lord Ordinary before whom the case is called or by the Lord Ordinary on the Bills in vacation on caution or without caution, and the Lord Ordinary may dispose of expenses as shall appear just; provided that his judgment shall be subject to the review of the Court by a reclaiming note duly lodged within ten days from the date thereof.<sup>10</sup> In other cases the petition for recall can only be presented in the Inner House,<sup>11</sup> and the Inner House have refused to remit to the Lord Ordinary on the Bills to recall.<sup>12</sup>

#### SUBSECTION (2).—*Letters of Interdiction.*<sup>13</sup>

**400.** These letters have been made incompetent by the Conveyancing (Scotland) Act 1924.<sup>14</sup>

#### SUBSECTION (3).—*Letters of Arrestment.*<sup>15</sup>

**401.** A warrant to arrest is now usually included in the will of a summons where arrestment on the dependence is appropriate, and is always contained in an extract decree, and letters of arrestment are

<sup>1</sup> 31 & 32 Vict. c. 101, s. 156; C.A.S., E, iii. 1; *Stevens v. Campbell*, 1873, 11 M. 772.

<sup>2</sup> 7 Will. IV. and 1 Vict. c. 41, s. 3.

<sup>3</sup> Now obsolete, but see 30 & 31 Vict. c. 96, ss. 9, 11–12; *Lamont*, 1867, 6 M. 84.

<sup>4</sup> *Weir v. Otto*, 1870, 8 M. 1070.

<sup>5</sup> *Graham Stewart on Diligence*, p. 529; *Dove v. Henderson*, 1865, 3 M. 339.

<sup>6</sup> *Graham Stewart on Diligence*, p. 534; *Heron v. Heron*, 1774, Mor. 7007.

<sup>7</sup> *Wilkie v. Tweedale*, 25th Feb. 1815, F.C. <sup>8</sup> *Jack v. M'Craig*, 1880, 7 R. 465.

<sup>9</sup> *Jur. Styles*, iii. 289.

<sup>11</sup> *Graham Stewart on Diligence*, p. 571.

<sup>13</sup> *Jur. Styles*, iii. 293 *et seq.*; *Scots Style Book*, v. 5, 128; 14 & 15 Geo. V. c. 27, s. 44 (3) (b).

<sup>14</sup> 14 & 15 Geo. V. c. 27, s. 44 (3) (b).

<sup>15</sup> *Jur. Styles*, iii. 296 *et seq.*; *Scots Style Book*, i. 392.

therefore not so often required as formerly. They are, however, still used where there is no warrant in the will of the summons; on a liquid document of debt although not registered; on a liquid document of debt, future or contingent, if the debtor be *vergens ad inopiam*; and by a defender found entitled to expenses where the pursuer is *vergens ad inopiam*.<sup>1</sup>

**402.** Letters of Arrestment *ad fundandam jurisdictionem*<sup>2</sup> are used simply to found jurisdiction and in themselves create no nexus beyond what is necessary for that purpose. The creditor's claim need not be liquid. The Bill is passed without any production.

**403.** *Recall of Arrestment.*—Arrestment on the dependence of a summons may be recalled or restricted by the Lord Ordinary before whom the case has been called or by the Lord Ordinary on the Bills in vacation on caution or without caution, subject to review by the Inner House on reclaiming note duly lodged within ten days from the date of the Lord Ordinary's interlocutor.<sup>3</sup> In other cases the petition for recall must be presented in the Inner House, though in the case of *Morison*<sup>4</sup> it was held that a petition to the Lord Ordinary on the Bills in vacation was competent where the summons had not been called or enrolled. Recall may also be obtained by letters for loosing of arrestments as stated below.

SUBSECTION (4).—*Letters of Horning, Horning and Poinding, Caption, etc.*<sup>5</sup>

**404.** These letters are now seldom required, the warrants contained in the extract decrees and the minutes under the Personal Diligence Act, 1838, being in most cases sufficient, but they are still competent and must be used in cases to which the provisions of that statute do not apply. Letters of horning, and horning and poinding, proceeding on a decree of the Court of Session, and on it alone, proceed *per decretum Dominorum Concilii*, require no bill, and are signeted on presentation at the Signet Office with the decree. These are seldom required now.

**405.** A Bill is required where some subsidiary document forms part of the ground of the diligence either in consequence of a change of creditor before the decree has been extracted or the bond or other deed registered for execution, in which case the assignee's title must be produced;<sup>6</sup> or in order to complete the statement of the prestation to be charged for, as by a docquetted account or balance-sheet referred to in a registered deed. A Bill cannot be used to connect the representatives of a debtor in a registered bond with the debtor.<sup>7</sup>

<sup>1</sup> Graham Stewart on Diligence, p. 22; *Wilkie v. Tweedale*, 25th Feb. 1815, F.C.; *Jack v. M'Craig*, 1880, 7 R. 465.

<sup>2</sup> Jur. Styles, iii. 305; Scots Styles, i. 422; Graham Stewart on Diligence, p. 247.

<sup>3</sup> 1 & 2 Vict. c. 114, s. 20.

<sup>4</sup> 1847, 10 D. 147.

<sup>5</sup> Jur. Styles, iii. 329; Scots Style Book, v. 40.

<sup>6</sup> *Mitchell v. St Mungo Lodge of Ancient Shepherds*, 1916 S.C. 689.

<sup>7</sup> Jur. Styles, iii. 343; *Kippen v. Hill*, 1822, 2 S. 105 (N.E. 99).



**406.** Letters of horning <sup>1</sup> are used where the obligation is one *ad factum præstandum* and the compulsitor is imprisonment; letters of horning and poinding <sup>2</sup> where the obligation is to pay money. Letters of caption <sup>3</sup> are obtained by the creditor producing letters of horning with the executions of charge and denunciation, and a certificate by the Keeper of the Register of Inhibitions and Adjudications that these have been duly registered, along with the Bill in the Bill Chamber. The deliverance signed by the Clerk of the Bills is "*Fiat ut petitur* because the Lords have seen the registered horning."

SUBSECTION (5).—*Letters of Open Doors.*<sup>4</sup>

**407.** Where proceedings have been taken under letters of horning and poinding, and access to poind moveables cannot be obtained on account of the premises in which they are being locked, letters of open doors may be used. The letters of horning and poinding and an execution of lockfast doors are produced with the Bill at the Bill Chamber, and the *fiat* granted "because the Lords have seen the letters of horning and poinding with the execution."<sup>5</sup>

SUBSECTION (6).—*Letters of Ejection.*<sup>6</sup>

**408.** Where a tenant who has been decerned to remove from a farm still continues in occupation the landlord may, after executing and registering a charge or letters of horning against him, instead of proceeding by petition to the Sheriff, procure letters of ejection addressed to the Sheriff of the County, ordering him to eject the tenant and put the complainer in possession.

SUBSECTION (7).—*Letters of Supplement.*<sup>7</sup>

**409.** Letters of supplement are used where a debtor in a bond is abroad and an assignee wishes to intimate his assignation, or where a trustee resigns and desires to intimate his resignation to a co-trustee whose address he cannot find.

SUBSECTION (8).—*Letters of Loosing of Arrestments.*<sup>8</sup>

**410.** Arrestments may be loosed by means of letters of loosing of arrestments passing the Signet, and that whether the arrestments are in execution or in security. Like other letters they are obtained by presenting a Bill at the Bill Chamber, but in this case, unlike the others previously mentioned, the Bill must be signed by the writer to the

<sup>1</sup> Jur. Styles, iii. 343.

<sup>2</sup> *Ibid.*, iii. 344.

<sup>3</sup> *Ibid.*, iii. 371.

<sup>4</sup> *Ibid.*, iii. 370, 373; Scots Style Book, vi. 168.

<sup>5</sup> Graham Stewart on Diligence, p. 350.

<sup>6</sup> Jur. Styles, iii. 377; Scots Style Book, vi. 136.

<sup>7</sup> Jur. Styles, iii. 379–382.

<sup>8</sup> Jur. Styles, iii. 314; Maclaren, B.C.P., p. 236; Scots Style Book, i. 409.

Signet who signs the letters. The procedure is regulated by A.S., 11th July 1826. There are five classes of such letters.<sup>1</sup>

**411.** (1) *Letters of Special Loosing of Arrestment used in Security or on the Dependence.*—These are appropriate where any particular arrestment or arrestments have been made in the hands of any person or persons named. Caution must be found by bond in the terms in use in the Bill Chamber; in cases where there is more than one arrestee the extent of caution in the case of each must be specified. The Bill is considered by the Lord Ordinary on the Bills, who may pronounce an interlocutor passing the Bill, and when caution is found to the satisfaction of the Clerk of the Bills, the latter writes his *flat* on the Bill and the letters are signeted. Forms of the interlocutor pronounced by the Lord Ordinary and of the *flat* signed by the Clerk are given below. In this class of letters no intimation is required to the arrester.

**412.** (2) *Letters of Special Loosing of Arrestment used in Execution.*<sup>2</sup>—As these letters affect arrestments proceeding upon decrees either of the Court or of registration they are only granted on the averment that the complainer has brought or is about to bring a suspension or reduction of the decree, and consignment is usually required. Only when the arrestment is already under suspension, or where the obligation is not liquid, or the term of payment is not arrived, will the Bill be passed on caution. No intimation is required to the arrester.

**413.** (3) *Letters of General Loosing of Arrestment*<sup>3</sup> *used or to be used upon the Dependence of an Action for a specific Sum or upon a Decree*<sup>4</sup> *in the Hands of Sundry Persons, neither Names nor Sums being mentioned.*—The complainer must produce to the Clerk of the Bills a copy certified by the Extractor of the Signet of the Bill on which the letters of arrestment sought to be loosed were issued. The caution required is *judicatum solvi*. In this case intimation of intention to present the Bill must be made to the arrester or his known agent forty-eight hours before presentation.

**414.** (4) *Letters of General Loosing of Arrestments*<sup>5</sup> *used on the Dependence of an Action concluding for an indefinite Sum, such as an Action of Damages or of Count and Reckoning.*—After presentation the Lord Ordinary appoints the Bill to be seen and answered within a fixed time, and after intimation has been made to the arrester in terms of the Lord Ordinary's interlocutor and an opportunity given to the arrester to be heard, modifies the sum for which caution is to be found to loose all arrestments.

**415.** (5) *Letters of Loosing of Arrestments ad fundandam jurisdictionem.*<sup>6</sup>—In this case caution *judicio sisti* must be found.

<sup>1</sup> Jur. Styles, iii. 315, 316; Maclaren, B.C.P., p. 236.

<sup>2</sup> *Ibid.*, iii. 315, 323; *Ibid.*, B.C.P., p. 236.

<sup>3</sup> *Ibid.*, iii. 315, 318; *Ibid.*, B.C.P., p. 237.

<sup>4</sup> *Smith v. Macintosh*, 1848, 10 D. 455; Maclaren, B.C.P., p. 237.

<sup>5</sup> Jur. Styles, iii. 315, 320; Maclaren, B.C.P., p. 237.

<sup>6</sup> *Ibid.*, iii. 316, 325; *Ibid.*, B.C.P., p. 237.

SUBSECTION (9).—*Form of Interlocutor on Bill for Loosing Arrestments.*<sup>1</sup>

416. “The Lord Ordinary, having heard the agents for the parties and considered the Bill for loosing of arrestments with the copy summons or letters of arrestment (as the case may be) produced, passes the Bill on consignation of £                      sterling (or on caution, etc., as the case may be).” This interlocutor is endorsed on the Bill and fee funded (5s.), and on the finding in the interlocutor for consignation or caution being obtempered a *fiat* is obtained from the Clerk in the following form :

*Form of Fiat by the Clerk of the Bills following on Lord Ordinary's Interlocutor.*—“*Fiat ut petitur* because the Lord Ordinary has passed the Bill to loose all arrestments used or that can be used on consignation of the sum of £                      (or on caution as the case may be) (provided the same be not laid on by virtue of a decree), and because the complainer has now consigned the said sum of £                      (or because (name and design cautioner) has become cautioner to the effect (or extent) foresaid as the case may be).”

SECTION 4.—WARRANT TO DISMANTLE.<sup>2</sup>

417. A warrant to dismantle a ship is issued by the Clerk of the Bills on presentation to him, or in his absence to the Assistant Clerk of the Bills, of a signeted summons containing a warrant to arrest ships.<sup>2</sup> The warrant is in the following terms :

“BILL CHAMBER,  
“EDINBURGH,                      19 .

“The Lords grant warrant to dismantle arrested vessels, the same being in safe harbour.

“ (Signed)                      “*Clerk of the Bills.*”

SECTION 5.—MINUTES FOR WARRANTS UNDER THE PERSONAL DILIGENCE ACT, 1838.<sup>3</sup>

418. Every care must be taken to follow strictly the instructions given in the Act and in the schedules annexed to the Act in these applications. The deliverance written by the Clerk of the Bills is in the form used in Bills for signet letters *Fiat ut petitur*.

The warrants are :

1. Warrant to imprison.<sup>4</sup>

2. Warrant at the instance of a person acquiring right to extract.<sup>5</sup>

As noted under letters of horning and poiding, this form is not available

<sup>1</sup> Jur. Styles, iii. 324-325.

<sup>2</sup> C.A.S., E, iii. 3.

<sup>3</sup> 1 & 2 Vict. c. 114.

<sup>4</sup> Sec. 6, Schedule 4.

<sup>5</sup> Sec. 7, Schedule 5.

to an assignee to a bond whose assignation is dated prior to the registration of the bond for execution, he not having "acquired right to an extract."

3. Warrant of concurrence to enable the holder of a Sheriff Court decree to enforce the same against the debtor or obligant in a sheriffdom other than that in which the decree has been issued.<sup>1</sup>

#### SECTION 6.—MINUTE FOR WARRANT TO CHARGE AN HEIR OR DISPONEE UNDER A PERSONAL OBLIGATION BY HIS ANCESTOR OR AUTHOR.

419. A warrant for this purpose may be applied for in the Bill Chamber under the Conveyancing Scotland Act, 1874, s. 47, Schedule K. Sec. 47 has been amended by the Conveyancing Scotland Act, 1924, s. 15, and it will be necessary in future to produce written evidence of the acceptance by the heir or donee of the personal obligation.<sup>2</sup>

### PART V.—BANKRUPTCY PROCEEDINGS.

420. For the administration of the bankruptcy statutes, see SEQUESTRATION.

### PART VI.—JUNIOR LORD ORDINARY PETITIONS.

421. For such petitions, transferred to the Bill Chamber under the Distribution of Business Act, 1857, and the Clerks of Session Act, 1889, and petitions to the Junior Lord Ordinary for appointment of umpire and for appointment of judicial factor under the Companies Clauses Act, 1845, ss. 3, 57, and 134, and the procedure therein, see PETITION.

### PART VII.—RAILWAY AND CANAL VALUATION APPEALS.

422. An appeal against the decision of the Assessor of Railways and Canals is competent in the Bill Chamber to railway and canal companies, water or gas companies whose lands and heritages have been valued by the said Assessor, and to any parish, county, or burgh interested in any valuation contained in the valuation roll prepared by him.<sup>3</sup> The appeal must be lodged not later than 10th April, and heard and determined not later than 15th May in each year.<sup>4</sup>

The Note of Appeal may be in manuscript or printed. It is

<sup>1</sup> Sec. 13, Schedule 10.

<sup>2</sup> See as to position of heir prior to 1924, *Fenton Livingstone v. Crichton's Trs.*, 1908 S.C. 1208.

<sup>3</sup> Valuation of Lands (Scotland) Act, 1854, 17 & 18 Vict. c. 91, ss. 23, 24, and 25.

<sup>4</sup> *Ibid.*, 1894, 57 & 58 Vict. c. 36, s. 3.



addressed to the Lord Ordinary on the Bills. It sets forth the entry in the valuation roll complained of and the appellant's objection thereto, and prays the Lord Ordinary to sustain the objection, or such other objections as may be competently stated, to alter and correct the valuation, to find and declare that the valuation should be arrived at by a certain method, to fix the valuation at a certain amount, and to appoint the valuation to be corrected accordingly. A statement of objections is usually appended. The Note may be signed by a law agent.

Intimation is ordered to be made to the Assessor and other parties interested. The proceedings are summary and may be taken in Court or in Chambers. A proof may be allowed or a remit made to a man of skill to inquire and report.<sup>1</sup>

## PART VIII.—MISCELLANEOUS BUSINESS.

### SECTION I.—PETITION FOR WARRANT TO ARREST SHIP IN ORDER TO ENFORCE MARITIME LIEN.

**423.** Where it is proposed to arrest a ship for the purpose of enforcing a maritime lien against the ship itself and not merely to found a personal action against the owners, the holder of the lien should proceed by a petition addressed to the Lord Ordinary on the Bills setting forth the nature of his claim, the port at which the ship is to be found, and the danger of the petitioner's right being lost by removal of the ship beyond the jurisdiction of the Court.<sup>2</sup>

**424.** In the case of *M'Connachie* the prayer was as follows: "May it therefore please your Lordship to grant warrant to Messengers-at-Arms to fence and arrest the said steamship at present lying in the James Watt Dock, Greenock, her hull, keel, engines, spars, sails and stores, with her float-boats, furniture and apparelling, all to remain under sure fence and arrestment at the instance of the Petitioner aye and until sufficient caution and surety be found acted in your Lordships' Books (in the Books of Council and Session) that the same shall be made forthcoming to the Petitioner as accords of law, and to grant authority for putting the said warrant into all lawful execution to the dismantling of the said steamship if necessary, and all upon a copy of your Lordships' deliverance certified by the Clerk of Court, or to do further or otherwise in the premises as to your Lordship shall seem proper."

**425.** The interlocutor pronounced by the Lord Ordinary after verbal report to the First Division and on the direction of the Court was: "Appoints the said Petition with a copy of this deliverance to be served

<sup>1</sup> *North British Railway Co. v. Assessor of Railways*, 1887, 25 S.L.R. 4.

<sup>2</sup> *Clan Line Steamers, Ltd. v. Earl of Douglas Steamship Co., Ltd.*, 1913 S.C. 967, per L. Dunedin at p. 973; *Lucovich, Petr.*, 1885, 12 R. 1090; *M'Connachie, Petr.*, 1914 S.C. 853.

upon W. Grunberg, Master of the S.S. *Wm. Eisenach*, and designed in the Petition, and allows him to appear at the Bar of this Court on Tuesday 23rd June 1914 at ten o'clock a.m. and lodge answers to this Petition within eight days after service, if so advised; Grants warrant to Messengers-at-Arms to arrest the S.S. *Wm. Eisenach*, *ad interim*, and that on exhibition of a certified copy of this interlocutor, and appoints the execution of arrestment to be reported to the Lord Ordinary within twenty-four hours."

#### SECTION 2.—NOTE FOR WARRANT TO BRING VESSEL INTO SAFE HARBOUR.

426. On the narrative that arrestments had been or were about to be used to found jurisdiction, and that a summons containing warrant to arrest had been signeted, and a warrant to dismantle applied for, and that the vessel to be arrested was lying in Leith Roads and about to sail beyond the jurisdiction of the Court, a warrant was granted to bring the vessel into Leith Harbour.<sup>1</sup> This warrant was granted by Lord Skerrington on a Saturday afternoon after the Divisions of the Inner House had risen.<sup>2</sup> In disposing of such cases as mentioned in this and the preceding section the Lord Ordinary exercises the powers of the High Court of Admiralty.<sup>3</sup>

#### SECTION 3.—PETITION FOR AUTHORITY TO REGISTER ENGLISH OR IRISH JUDGMENT AFTER THE EXPIRY OF TWELVE MONTHS FROM THE DATE OF THE JUDGMENT.

427. An English or Irish judgment cannot be registered in the Books of Council and Session for execution under the Judgments Extension Act, 1868, after twelve months from the date of the judgment unless application shall have been first made to and leave obtained from the Lord Ordinary on the Bills. The application is made by petition signed by counsel or agent, and if nought appears to the contrary it is granted forthwith.<sup>4</sup>

#### SECTION 4.—NOTE FOR WARRANT TO INVENTORY IN AN ACTION OF POUNDING OF THE GROUND.

428. The service of a summons of pounding of the ground creates a *nexus*, and a warrant to inventory the effects should be obtained to preserve evidence of what has been attached. This is done by presenting a Note craving such authority in the Bill Chamber.<sup>5</sup>

<sup>1</sup> Maclaren, p. 233.

<sup>2</sup> *Lorentsen v. Larsen*, 17th Oct. 1908, unreported.

<sup>3</sup> 1 Will. IV. c. 69, s. 21.

<sup>4</sup> 31 & 32 Vict. c. 54, s. 2.

<sup>5</sup> Graham Stewart on Diligence, p. 500; Maclaren, B.C.P., p. 235; *Workman, Petr.*, 5th May 1910, per L. Cullen; *Edinburgh Mortgage Co., Ltd.*, 23rd May 1911, per L. Ormidale, both unreported.

SECTION 5.—ENFORCEMENT OF ORDERS UNDER THE COMPANIES CONSOLIDATION ACT, 1908,<sup>1</sup> AND THE BANKRUPTCY ACT, 1914.<sup>2</sup>

429. (a) On production to the Clerk of the Bills of an office copy of any order made by any of the Courts having jurisdiction in bankruptcy in England or Ireland respectively under the bankruptcy statutes, or of any order made by the Courts in England or Ireland respectively for or in course of the winding-up of any company under the Companies Acts, the same shall be registered *in extenso* in a register to be kept for that purpose in the office of the said Clerk, on payment of the fee mentioned in the schedule, and the said register shall be open to inspection of all concerned, on payment of the fee mentioned in the said schedule.<sup>3</sup>

(b) After registration as aforesaid, the Clerk of the Bills shall append to such office copy a certificate subscribed by him of the registration thereof, in the terms mentioned in said schedule, and the same being so registered and certified, shall be a sufficient warrant to officers of Court to charge for payment of the sums recoverable under such order, and of the expense of registering the same, and to use any further diligence that may be competent, in the same manner as if such order had been a decree originally pronounced in the Court of Session on the date of such registration as aforesaid.<sup>3</sup>

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<sup>1</sup> 8 Edw. VII. c. 69, s. 180.

<sup>2</sup> 4 & 5 Geo. V. c. 59, ss. 121–123.

<sup>3</sup> C.A.S., E, iv. The schedule prescribes that the fee for registration is 5s., and for a search 2s. 6d.

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## BILL OF ADVOCATION.

*See* APPEAL (CRIMINAL).

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## BILL OF EXCEPTIONS.

*See* JURIES.

# BILLS OF EXCHANGE.

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required for that purpose. It is useless, therefore, to attempt, as some have done, to deduce the principles of this branch of the law from the principles of the civil law, or of the common law. They were and are just what the merchants made them.

431. When questions arose connected with bills of exchange, they were decided in the Courts of the Law Merchant, and the Courts of the Common Law took no cognisance of such disputes. After many centuries the Courts of the Law Merchant fell unto disuse, and such disputes came to be decided in the Common Law Courts ; but in deciding them, these Courts had regard to the principles of the Law Merchant, that is to say, to the customs of merchants. Such customs were averred and proved as matters of fact, and if approved by the Court they were given effect to, and thus gradually became incorporated into the common law.

SUBSECTION (2).—*The Bills of Exchange Act, 1882.*

432. From time to time statutes have been enacted adapting the law to more modern requirements, and finally the Bills of Exchange Act, 1882 (hereinafter referred to as the Act) was passed, codifying the whole law on the subject, and incidentally assimilating the laws of England and Scotland on some of the points on which they differed. The rule for the construction of the Act is thus stated by Lord Herschell : “ I think the proper course is, in the first instance, to examine the language of the statute, and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding, such as a demurrer to evidence. I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one in relation to such instruments, the same interpretation might well be put upon them in the code. I

give these as examples merely ; they, of course, do not exhaust the category.”<sup>1</sup>

**433.** Following out this ruling, the sections of the Act are incorporated in the text which follows, each section having its number as in the Act appended to it, and few prior authorities are cited, except where they seem useful as illustrations, or deal with points not noticed in the Act.

## SECTION 2.—STAMPING OF BILLS, NOTES, AND CHEQUES.

**434.** A bill of exchange must be duly stamped in terms of the Stamp Act 1891, as amended by the Acts of 1899, 1909, and 1918.<sup>2</sup> The duty is *ad valorem*, and the amount is specified in these Acts. A bill of exchange cannot be stamped after it is issued in this country, and if it is not stamped in terms of the Acts, no one can recover thereon, or make the same available for any purpose whatever, except in criminal proceedings.<sup>3</sup> It is *pars judicis* to take notice of the want or insufficiency of a stamp, and parties issuing, etc., any unstamped bill or note incur a penalty.

**435.** As to the kind of stamps which must be used, the effect of the Acts appears to be this : (1) Bills of exchange, whether inland or foreign, payable on demand or not more than three days after date or sight, may be stamped with an adhesive or impressed twopenny stamp. (2) Other inland bills and promissory notes must be stamped with an impressed *ad valorem* stamp. (3) Foreign bills and promissory notes must be stamped with adhesive *ad valorem* stamps, and the first party in the United Kingdom into whose hands the bill or note comes must affix to it the proper adhesive stamp, and cancel it before he uses the bill in any way. Cheques must be stamped with an impressed or adhesive stamp.

**436.** An inland bill is a bill which is, or on the face of it purports to be, (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill. For the purposes of the Act, “ British Islands ” mean any part of the United Kingdom of Great Britain and Ireland, the Islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them, being part of the Dominions of His Majesty. Unless the contrary appear on the face of the bill the holder may treat it as an inland bill (s. 4). For stamp purposes, however, any bill drawn or made out of the United Kingdom is a foreign bill. So bills drawn in the Isle of Man or Channel Islands are foreign bills.

In England the only practical difference between a foreign and an inland bill is that the former when dishonoured must be protested, the latter need not. In Scotland all dishonoured bills must, however, be protested if it is proposed to proceed by summary diligence, and in practice they all are.

<sup>1</sup> *Bank of England v. Vagliano Bros.*, [1891] A.C. at p. 144.

<sup>2</sup> 54 & 55 Vict. c. 39; 62 & 63 Vict. c. 9; 9 Edw. VII. c. 43; 8 & 9 Geo. V. c. 15.

<sup>3</sup> 54 & 55 Vict. c. 39, s. 38 (1).

## SECTION 3.—QUALITIES AND REQUISITES OF BILLS.

SUBSECTION (1).—*Definition of a Bill.*

**437.** A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer (s. 3 (1)).

An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange (s. 3 (2)).

**438.** The person giving the order is called the drawer; the person to whom the order is given is called the drawee, and if he accepts it he is called the acceptor; the person who is to receive the money is called the payee. "Writing" includes print, and a bill may be expressed on paper by ink, pencil, lithography, engraving, typewriting, or other like means, and in any language English or foreign.<sup>1</sup> An instrument which does not comply with these conditions may still be valid proof of indebtedness.<sup>2</sup>

SUBSECTION (2).—*Must be an Unconditional Order.*

**439.** A bill of exchange must be an unconditional order. If bills were issued encumbered with conditions, and if the persons to whom they were offered in negotiation were obliged to inquire when these uncertain events would be reduced to a certainty, it is obvious that the negotiability of the bills would be in such cases destroyed.<sup>3</sup> An order to pay out of a particular fund is not unconditional, because such a fund may not exist; but an unqualified order to pay, coupled with an indication of a particular fund out of which the drawee is to reimburse himself, or a particular account to be debited with the amount, or a statement of the transaction which gives rise to the bill, is unconditional (s. 3 (3)). A bill of exchange must be an order. An expression of a mere wish is not sufficient.<sup>4</sup>

SUBSECTION (3).—*Signature.*

**440.** The bill must be signed by the drawer. It is not necessary, however, that he should sign it with his own hand. It is sufficient if his signature is written on the bill by some other person by or under his authority (s. 91 (1)). The initials of the drawer are sufficient, provided initialing be his usual mode of subscription. A signature made by another person, but attested by mark, is sufficient. A bill may also be

<sup>1</sup> *In re Marseilles Co.*, 1885, L.R. 30 Ch.D. 598.

<sup>2</sup> *Lawson's Exrs. v. Watson*, 1907 S.C. 1353; *Paris v. Paris* (O.H.), 1913, 2 S.L.T. 209.

<sup>3</sup> *Story*, s. 46.

<sup>4</sup> *Hamilton v. Spottiswoode*, 1849, 4 Ex. 200; 18 L.J. Ex. 393.



signed by a notary public and two witnesses on behalf of any person. In the case of a corporation, it is sufficient if the bill be sealed with the corporate seal. But this is not to be construed as requiring the bill of a corporation to be under seal (s. 91 (2)). As regards companies under the Companies (Consolidation) Act, 1908, it is provided that a bill of exchange or promissory note shall be deemed to have been made, accepted, or indorsed on behalf of the company, if made, accepted, or indorsed in the name of, or by or on behalf or on account of the company by any person acting under its authority.<sup>1</sup>

**441.** Signature of a document is the usual way of expressing consent to the terms therein contained, and the person so signing will be held bound by the obligations contained therein. In the general case, he will not be heard to say that he did not know what was contained in the document. But if a person is induced by fraud to sign a bill under the belief that he is signing a wholly different instrument, the case is different, and his signature will be null and void, even in a question with a holder in due course, provided that in so signing he acted without negligence.<sup>2</sup>

**442.** Authority is frequently given by one person to another to sign his name by procuration, as it is called. This authority may be given by a formal letter of attorney, or it may be implied from a course of dealing, or from the relation of the parties. The agent in exercising the authority signs the name of the principal, preceded by the words "per procuration," or some contraction thereof, and below that he signs his own name. A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (s. 25). The apparent authority is, however, the real authority. If, therefore, the agent have in fact authority, the abuse of it does not affect a *bona fide* holder for value. Whenever the very act of the agent is authorised by the terms of the power, that is, whenever by comparing the act done by the agent with the words of the power, the act is in itself warranted by the terms used, such act is binding on the constituent as to all persons dealing in good faith with the agent; such persons are not bound to inquire into facts *aliunde*. So where an agent had authority to make contracts of sale and purchase, and incidental thereto had authority to indorse bills, but not to borrow money on behalf of the company, and he indorsed two bills *per pro* in the company's name, discounting them with a banker, and employing the loan to his own purposes, it was held that his abuse of his authority did not disentitle the banker to recover from the company on the bills.<sup>3</sup>

<sup>1</sup> 8 Edw. VII. s. 77; *Chapman v. Smethurst*, [1909] 1 K.B. 927; *Stacey v. Wallis*, 1912, 106 L.T. (N.S.) 544.

<sup>2</sup> *Foster v. Mackinnon*, 1869, L.R. 4 C.P. 704. For a definition of negligence, see par. 587, *infra*.

<sup>3</sup> *Bryant Powis & Bryant v. Banque du Peuple*, [1893] A.C. 170; *Hambro v. Burnand*, [1904] 2 K.B. 10; *Union Bank v. Makin*, 1873, 11 M. 499.

If the party discounting a bill has reason to know that the procuratory has been withdrawn, he will not be entitled to hold the principal liable.<sup>1</sup>

SUBSECTION (4).—*The Drawee.*

**443.** The drawee must be named, or otherwise indicated in the bill with reasonable certainty (s. 6 (1)). The payee cannot otherwise know upon whom he is to call to accept and pay the bill, nor can any other person know whether it is addressed to him or not, and whether he would be justified in accepting and paying the bill on account of the drawer. A bill may be addressed to two or more drawees, whether they are partners or not, but an order addressed to two drawees in the alternative, or to two or more drawees in succession, is not a bill of exchange (s. 6 (2)).

SUBSECTION (5).—*Place of Payment.*

**444.** If the drawer intends that the bill shall be payable at a particular place, he may insert such a direction, and the drawer himself cannot be charged, unless the bill has been presented at the place where he has made it payable (s. 45).

SUBSECTION (6) *Referee in Case of Need.*

**445.** The drawer of a bill or any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit (s. 15).

SUBSECTION (7).—*Time for Payment.*

**446.** A bill of exchange must require the person to whom it is addressed to pay on demand, or at a fixed or determinable future time. A bill is payable on demand (*a*) which is expressed to be payable on demand, or at sight, or on presentation; or (*b*) in which no time for payment is expressed (s. 10 (1)). A bill is payable at a determinable future time which is expressed to be payable (1) at a fixed period after date or sight; or (2) on or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain. An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect (s. 11). For example, a bill payable so many days after the arrival of a certain ship is invalid, for the ship may never arrive.<sup>2</sup>

**447.** Where a bill is not payable on demand, the day on which it falls due is determined as follows: (1) Three days, called days of grace, are

<sup>1</sup> *North of Scotland Banking Co. v. Behn Möller & Co.*, 1881, 8 R. 423.

<sup>2</sup> *Palmer v. Pratt*, 1824, 2 Bing. 185.

in every case, where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace : Provided that (a) when the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day. (b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday), under the Bank Holiday Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day (s. 14 (1)). Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run, and by including the day of payment (s. 14 (2)). When a bill is payable at a fixed period after sight, the time begins to run from the date of acceptance, if the bill be accepted, and from the date of noting or protest, if the bill be noted or protested for non-acceptance or for non-delivery (s. 14 (3)). The term " month " in a bill means calendar month (s. 14 (4)), the month running from a date in one month to the corresponding date in the following month. If there be no corresponding date, the month or period terminates on the last day of the month.

SUBSECTION (8).—*The Sum payable.*

**448.** The order in a bill of exchange must be to pay a sum certain in money, and to do nothing more. If more be required it is not a bill of exchange. The sum must appear certain on the face of the bill. If it is to be ascertained from other sources the document is not a bill.<sup>1</sup> The sum must be written distinctly in the body of the bill. It is often also expressed in figures, but if there is a discrepancy between the two, the sum denoted by the words is the amount payable (s. 9 (2)).

**449.** The sum payable by a bill is a sum certain within the meaning of the Act, although it is required to be paid (a) with interest, but the interest must be definitely ascertainable on the face of the bill<sup>2</sup>; (b) by stated instalments; (c) by stated instalments, with a provision that upon default in payment of any instalment the whole shall become due; (d) according to an indicated rate of exchange, or according to a rate of exchange to be ascertained as directed by the bill (s. 9 (1)). Where a bill is expressed to be payable with interest, interest runs, unless the instrument otherwise provides, from the date of the bill, and if the bill is undated, from the issue thereof (s. 9 (3)). If the rate of interest is not specified the rate will be 5 per cent.<sup>3</sup> Where a bill is drawn out

<sup>1</sup> *Smith v. Nightingale*, 1818, 2 Stark. 375; *Jones v. Simpson*, 1823, 2 B. & C. 318; *Crowfoot v. Gurney*, 1832, 9 Bing. 372; *Bolton v. Dugdale*, 1833, 4 B. & Ad. 619; *Ayrey v. Fearnside*, 1838, 4 M. & W. 168.

<sup>2</sup> *Lamberton v. Aiken*, 1899, 2 F. 189.

<sup>3</sup> *Smith v. Barlas*, 1857, 19 D. 267; *Hirschfield v. Smith*, 1866, L.R. 1 C.P. 353.



of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some expressed stipulation, be calculated according to the rate of exchange for sight drafts, at the place of payment, on the day the bill is payable (s. 72 (4)).<sup>1</sup>

SUBSECTION (9).—*The Payee.*

**450.** The order must be to pay to or to the order of a specified person or to bearer. A bill may be drawn payable to or to the order of the drawer, or it may be drawn payable to or to the order of the drawee. Where in a bill drawer and drawee are the same person, or where the drawee is a fictitious person, or a person not having capacity to contract, the holder may treat the instrument at his option either as a bill of exchange or as a promissory note (s. 5). Where a bill is not payable to bearer the payee must be named or otherwise indicated with reasonable certainty (s. 7 (1)). Extrinsic evidence is admissible to identify the payee when misnamed, or where designated by description only, but not to explain away an uncertainty patent on the bill.<sup>2</sup> A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two or to one or some of several payees. A bill may also be made payable to the holder of an office for the time being (s. 7 (2)). Where a payee is a fictitious or non-existent person, the bill may be treated as payable to bearer (s. 7 (3)). A name is fictitious in the sense of the Act, not only in the case where it is a creature of the imagination having no real existence, but also in the case where the name is inscribed by way of pretence merely, without any intention that payment shall only be made in conformity therewith.<sup>3</sup> The effect of this provision is that anyone in possession of the bill can demand payment thereof, and payment by the acceptor in good faith to such a person discharges the bill. Also a bank at which the bill has been made payable may pay it to the person in possession of the bill and debit the acceptor with the amount.

SUBSECTION (10).—*What Bills are Negotiable.*

**451.** When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable (s. 8 (1)). A negotiable bill may be payable either to order or bearer (s. 8 (2)). A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank (s. 8 (3)). Bearer means the person in possession of a bill or note which is payable to bearer (s. (2)).

<sup>1</sup> *Smith v. Barlas*, 1857, 19 D. 267; *Hirschfield v. Smith*, 1866, L.R. 1 C.P. 353.

<sup>2</sup> *Soares v. Glyn*, 1845, 8 Q.B. 24; *Holmes v. Jaques*, 1866, L.R. 1 Q.B. 376; *Willis v. Barrett*, 1816, 2 Stark. 29; *Chamberlain v. Young*, [1893] 2 Q.B. 206.

<sup>3</sup> *Bank of England v. Vagliano Brothers*, [1891] A.C. 144; *Clutton v. Attenborough*, [1897] A.C. 90; *Vinden v. Hughes*, [1905] 1 K.B. 795; *North & South Wales Bank v. Macbeth*, [1908] A.C. 137.



SUBSECTION (11).—*Bill Indorsed in Blank.*

**452.** Where a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement, by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person (s. 34 (4)).

SUBSECTION (12).—*Bill Payable to Order.*

**453.** A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable (s. 8 (4)). Where a bill either originally or by indorsement is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option (s. 8 (5)).

SUBSECTION (13).—*Date of Bill.*

**454.** A bill is not invalid by reason that it is not dated (s. 3 (4) (a)). Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly. Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course, the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date (s. 12).

SUBSECTION (14).—*Who is a Holder.*

**455.** Holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof (s. (2)). He may be an unlawful holder (*e.g.* the finder of a bill indorsed in blank), but he can nevertheless give a valid discharge to a person who pays it in good faith, and also a good title to a person who takes it before maturity, in good faith, and for value. A person, however, holding a bill under a forged indorsement is not a holder in any sense. He is a mere wrongful possessor.<sup>1</sup>

SUBSECTION (15).—*Ante-dating and Post-dating.*

**456.** Where a bill or an acceptance, or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be (s. 13 (1)). A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday (s. 13 (2)). The

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<sup>1</sup> Chalmers on Bills, 8th ed., p. 6.

date is only material as regulating the term of payment, which bears reference to the date in the bill. It follows, therefore, that should the drawer die before the arrival of the date inserted in the bill, the bill remains valid.<sup>1</sup>

SUBSECTION (16).—*Presumption of Value given.*

**457.** A bill is not invalid by reason that it does not specify the value given, or that any value has been given therefor (s. 3 (4) (b)). Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value (s. 30).

SUBSECTION (17).—*Place of Drawing and Payment.*

**458.** A bill is not invalid by reason that it does not specify the place where it is drawn, or the place where it is payable (s. 3 (4) (c)). Where a bill is made payable elsewhere than at the residence or place of business of the drawee, the bill is said to be domiciled where payable.

SECTION 4.—CAPACITY AND AUTHORITY OF PARTIES.

SUBSECTION (1).—*Capacity distinguished from Authority.*

**459.** Capacity to incur liability as a party to a bill is co-extensive with capacity to contract (22 (1)). But nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations.

The capacity to incur liability must be distinguished from authority. The former means power to contract so as to bind oneself. The latter means power to contract on behalf of another so as to bind him. Capacity is a question of law, authority is usually a question of fact.<sup>2</sup>

SUBSECTION (2).—*Effect of Incapacity of one or more Parties.*

**460.** Where a bill is drawn or indorsed by an infant, minor, or corporation having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto (s. 22 (2)). The incapacity of one or more of the parties to a bill in no way diminishes the liability of the other parties thereto. Thus the acceptor cannot set up the incapacity of the drawer,<sup>3</sup> and the drawer cannot set up the incapacity of the acceptor or payee,<sup>4</sup> and the indorser cannot set up the incapacity of the drawer or of a previous indorser.<sup>5</sup> In all such cases, the holder is entitled to receive payment of the bill, and to enforce it against any other party thereto.

<sup>1</sup> *Pasmore v. North*, 1811, 13 East 517.

<sup>2</sup> Chalmers on Bills, 8th ed., p. 68.

<sup>3</sup> Para. 506, *infra*.

<sup>4</sup> Para. 507, *infra*.

<sup>5</sup> Para. 508, *infra*.

## SECTION 5.—CONSIDERATION.

**461.** Valuable consideration is not necessary by the law of Scotland to support an obligation. Non-onerosity is, therefore, not a defence pleadable by an acceptor or by an indorser who has accepted or indorsed a bill without consideration.<sup>1</sup> This, of course, does not apply to an acceptance for the accommodation of the drawer, which is a special case presently to be considered. Non-onerosity, however, may be of importance where the bill is challenged on other grounds, as for illegality or fraud. In some circumstances it may go to shew that the transaction was wholly fraudulent, and consequently that any claim upon the bill between the immediate parties thereto is out of the question.<sup>2</sup> In other cases it may support the contention that defects exist in the title of parties to the bill.<sup>3</sup>

## SECTION 6.—HOLDER FOR VALUE.

**462.** Valuable consideration for a bill may be constituted by any consideration sufficient to support a simple contract (s. 27 (1)). This has been defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.<sup>4</sup> It may be constituted, also, by an antecedent debt or liability. Such a debt or liability is deemed valuable consideration, whether the bill is payable on demand or at a future time. Where value has at any time been given for a bill, the holder is deemed to be a holder for value, as regards the acceptor, and all parties to the bill prior to such time (s. 27 (2)).

**463.** Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (s. 27 (3)). A banker has a lien on all bills received from a customer in the ordinary course of banking business, in respect of any balance that may be due from such customer. He is therefore a holder for value in respect of such balance. If he has discounted any such bills, he then becomes in the ordinary case a holder in due course.

**464.** A holder for value, although he be not a holder in due course, can sue on the bill in his own name, but he may be met by defences founded on a defect in his own title, or in the title of previous parties. He cannot have a better title than his authors. Where his title is defective, however, if he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill, and if he obtains payment of the bill, the person who pays him in due course gets a valid discharge (s. 38).

<sup>1</sup> *Law v. Humphrey*, 1876, 3 R. 1192.

<sup>2</sup> *Young v. Gordon*, 1896, 23 R. 419.

<sup>3</sup> *Hamilton v. Main*, 1823, 2 S. 356; *Kennedy v. Cameron*, 1823, 2 S. 192; *Thomson v. MacKaile*, 1770, Mor. 9519; *Don v. Richardson*, 1858, 20 D. 1138; *Maitland v. Ratray*, 1848, 11 D. 71; *Graham v. Kennedy*, 1860, 22 D. 560; *Bell's Prin.* 36 (4), 325.

<sup>4</sup> *Currie v. Misa*, 1874, L.R. 10 Ex. 162; 1876, 1 App. Cas. 554.

## SECTION 7.—HOLDER IN DUE COURSE.

SUBSECTION (1).—*Definition.*

**465.** A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely :

(a) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact.

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it (s. 29 (1)).

SUBSECTION (2).—*Defects in Title.*

**466.** In particular, the title of a person who negotiates a bill is defective within the meaning of the Act if he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud (s. 29 (2)).

SUBSECTION (3).—*Rights of Holder in due course.*

**467.** A holder in due course holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill (s. 38). In short, it may be said that a bill in the hands of a holder in due course is practically the same as cash. The bill has come into his hands as currency, and he has the rights of a holder of such. Among the defects of title enumerated above is that where the person who negotiates the bill has obtained the bill by force and fear, and the effect of the clause seems to be that even in such a case a holder in due course can enforce it. This would be a very startling change in the law of Scotland, where it has long been settled that force used to obtain the subscription of a bill nullifies that subscription, since the subscriber's consent is wanting. The party is not bound by such a subscription any more than if it had been forged, and as an obligation originally null cannot become valid by transmission, even an onerous indorsee cannot have a better claim under a bill thus subscribed than the original payee.<sup>1</sup> It remains to be seen how the Scottish Courts will construe this provision of the Act.

SUBSECTION (4).—*Good Faith.*

**468.** A holder in due course must have taken the bill in good faith. A thing is deemed to be done in good faith, within the meaning of the

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<sup>1</sup> Thomson on Bills, 2nd ed., 62.



Act, where it is in fact done honestly, whether it is done negligently or not (s. 90). If value be given for a bill of exchange, it is not enough to shew that there was carelessness, negligence, or foolishness in not suspecting that the bill was wrong, when there were circumstances that might have aroused such suspicion. It is necessary to shew that the person who gave value for the bill was affected with notice that there was something wrong about it when he took it. It is not necessary, however, that he should have notice of what the particular wrong was. But such evidence of carelessness or blindness may with other circumstances be relevant to the question whether the holder did know there was something wrong. "If he was honestly blundering and careless, and so took the bill when he ought not to have taken it, still he is entitled to recover. But if the facts and circumstances are such that the jury, or whoever has to try the question, comes to the conclusion that he was not honestly blundering, but that he must have had a suspicion that there was something wrong, and that he refrained from asking questions, not because he was an honest blunderer, but because he thought in his own secret mind—I suspect there is something wrong, and if I make further inquiry, it will be no longer my suspecting it, but my knowing it, and then I shall not be able to recover—that is dishonesty." <sup>1</sup>

SUBSECTION (5).—*Overdue Bill.*

**469.** A holder in due course must have become the holder of it before it was overdue. Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (s. 36 (2)). A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact (s. 36 (3)). Except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue (s. 36 (4)).

SUBSECTION (6).—*Notice of Dishonour.*

**470.** Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this subsection shall affect the rights of a holder in due course (s. 36 (5)).

SUBSECTION (7).—*Presumption of Value and Good Faith.*

**471.** Every party whose signature appears on a bill is *prima facie* deemed to have become a party thereto for value. Every holder of a

<sup>1</sup> *Jones v. Gordon*, 1877, L.R. 2 App. Cas. 616, per Lord Blackburn at p. 629.

bill is *prima facie* deemed to be a holder in due course ; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill (s. 30). In Scotland this procedure will be followed in a suspension of a charge on the bill.<sup>1</sup> A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder (s. 29 (3)).

#### SECTION 8.—DELIVERY OF A BILL.

##### SUBSECTION (1).—*Necessity as between Immediate Parties.*

**472.** Delivery means transfer of possession, actual or constructive, from one person to another (s. 2). Every contract on a bill, whether it be the drawer's, the acceptor's, or an indorser's, is incomplete and revocable until delivery of the instrument in order to give effect thereto. But where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable (s. 21 (1)). As between immediate parties, that is to say, parties who are in direct relation to each other, such as the drawer and the acceptor, the drawer and the payee, the indorser and the next indorsee, the delivery in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be (s. 21 (2) (a)). The same is true as regards remote parties, other than a holder in due course.

##### SUBSECTION (2).—*In a Question with a Holder in due course.*

**473.** In the case of a bill in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him, so as to make them liable to him, is conclusively presumed (s. 21 (2) (b)). The effect of this provision seems doubtful. Suppose a party writes an acceptance on a bill but puts it away in his desk, wishing to make some inquiries before delivering it. Suppose that it is stolen, and thereafter negotiated to a holder in due course. The above subsection of the Act seems to say that the party is liable as acceptor of the bill, although he has not delivered it. The contrary has been decided in cases relating to the delivery of inchoate bills,<sup>2</sup> and as already noted,<sup>3</sup> a party who signs a bill under the belief that it is a wholly different instrument, and without negligence, is not liable thereon even to a holder in due course. Why, then, should a man be liable to anyone upon a bill which he never delivered at all ?

<sup>1</sup> Para. 575, *infra*.

<sup>2</sup> Para. 586, *infra*.

<sup>3</sup> Para. 441, *supra*.

SUBSECTION (3).—*Conditional Delivery.*

**474.** As between immediate parties, and as regards a remote party other than a holder in due course, the delivery may be shewn to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill (s. 21 (2) (b)). If the condition is not purified, or if the bill is used for another purpose, the party who so delivers it is not liable on the bill to such parties. To a holder in due course he is liable, because he has undoubtedly delivered the bill, and the condition under which he has delivered it is unknown to the holder in due course. The terms on which a bill is delivered can be proved by parole evidence. Such evidence in no way contradicts the terms of the bill. It only shews that what purports to be a complete contract has never come into operative existence.<sup>1</sup> Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved (s. 21 (3)).

## SECTION 9.—PRESENTMENT FOR ACCEPTANCE.

SUBSECTION (1).—*When necessary.*

**475.** In the general case a bill can be presented for acceptance and for payment at one and the same time. No separate presentment for acceptance is required. In practice, however, it is usual for the holder to present the bill to the drawee without delay. If acceptance be obtained, the security of the bill is enhanced; if it be refused, the holder can at once proceed against the drawer. There are certain cases, however, in which a separate presentment for acceptance is essential.

**476.** Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument (s. 39 (1)). Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment (s. 39 (2)). This is obviously necessary, because presentment for acceptance at the place of payment would be useless if the drawee were not there. Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers (s. 39 (4)).

SUBSECTION (2).—*Time for Presentment.*

**477.** When a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

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<sup>1</sup> *Martini v. Steel and Craig*, 1878, 6 R. 342.

If he do not do so, the drawer and all indorsers prior to that holder are discharged. In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case (s. 40).

Courts have refrained from limiting any time within which bills of this kind, when put into circulation, must be presented. It has even been laid down that such a bill might be safely kept in circulation for a year without presentment.<sup>1</sup> There is an exception, however, to the rule as to presentment for acceptance when the holder of the bill is merely agent for the creditor. In all such cases presentment for acceptance must be made as soon as the bill comes into the agent's hands, otherwise he will be liable for loss to the creditor caused by his delay, for example, through the failure of the drawer before the bill is presented, in consequence of which the drawee refuses to accept.<sup>2</sup>

#### SUBSECTION (3).—*Rules as to Presentment.*

**478.** A bill is duly presented for acceptance when it is presented in accordance with the following rules (s. 41 (1)) :—

(a) The presentment must be made by or on behalf of the holder to the drawee or to some person authorised to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue. All days are business days except (a) Sunday, Good Friday, Christmas Day ; (b) a bank holiday, under the Bank Holidays Act, 1871, or Acts amending it ; (c) a day appointed by Royal Proclamation as a public fast or thanksgiving day (s. 92).

(b) Where a bill is addressed to two or more drawees who are not partners, presentment must be made to them all, unless one has authority to accept for all ; then presentment may be made to him only. But if one of such drawees refuses to accept, presentment to the others need not be made and the bill may be treated as dishonoured (ss. 19, 44 (1)).

(c) Where the drawee is dead, presentment may be made to his personal representative.

(d) Where the drawee is bankrupt, presentment may be made to him or to his trustee.

(e) Where authorised by agreement or usage, a presentment through the post office is sufficient.

#### SUBSECTION (4).—*Excuses for Non-presentment.*

**479.** Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance :—

(a) Where the drawee is dead, or is a fictitious person or a person not having capacity to contract by bill :

<sup>1</sup> *Muilman v. D'Eguino*, 1795, 2 H.Bl. 565.

<sup>2</sup> *Dunlop v. Hamilton & Co.*, 16th Jan. 1810, F.C.



(b) Where, after the exercise of reasonable diligence, such presentment cannot be effected :

(c) Where although the presentment has been irregular, acceptance has been refused on some other ground.

The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured does not excuse presentment (s. 41 (2)).

#### SUBSECTION (5).—*Non-acceptance and its Consequences.*

**480.** When a bill is duly presented for acceptance and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers (s. 42). The bill may be left for acceptance for twenty-four hours, but the time depends on usage at the place.<sup>1</sup> A bill is dishonoured by non-acceptance—

(a) When it is duly presented for acceptance, and such an acceptance as is prescribed by the Act is refused or cannot be obtained ; or

(b) When presentment for acceptance is excused and the bill is not accepted.

When a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary (s. 43).

### SECTION 10.—ACCEPTANCE.

#### SUBSECTION (1).—*Definition and Requisites.*

**481.** The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer (s. 17 (1)). Except in the case of acceptance for honour, no person other than the drawee can be liable as acceptor of a bill.<sup>2</sup>

**482.** An acceptance must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient. It must not express that the drawee will perform his promise by any other means than the payment of money (s. 17 (2)). Where the bill is payable after sight it is proper that the date of acceptance be added, but if this is not done the date may be inserted by the holder (s. 12).

#### SUBSECTION (2).—*Time for Acceptance.*

**483.** A bill may be accepted (1) before it has been signed by the drawer, or while otherwise incomplete. The drawer may sign his name even after the acceptor's death.<sup>3</sup> (2) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment. (3) When a bill payable after sight is dishonoured by non-acceptance and the drawee subsequently accepts it, the holder, in the

<sup>1</sup> *Bank of Van Diemen's Land v. Bank of Victoria*, 1871, L.R. 3 P.C. 526.

<sup>2</sup> *Steele v. M'Kinlay*, 1880, L.R. 5 App. Cas. 754.

<sup>3</sup> *Carter v. White*, 1883, L.R. 25 Ch.D. 666.

absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance (s. 18). When a bill is accepted when it is overdue, this is a valid acceptance of a bill payable on demand (s. 10 (2)).

SUBSECTION (3).—*General and Qualified Acceptances.*

**484.** An acceptance is either (a) general or (b) qualified. A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn. In particular an acceptance is qualified which is (a) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated, *e.g.* “accepted, payable on giving up bills of lading for clover per ship *Amazon*”<sup>1</sup>; (b) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn; (c) local, that is to say, an acceptance to pay only at a particular specified place: an acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere; (d) qualified as to time; (e) the acceptance of some one or more of the drawees but not of all (s. 19).

SUBSECTION (4).—*Presentment for Payment of Qualified Acceptance.*

**485.** Where an acceptance to pay at a particular specified place is granted, presentment for payment may be made at that place, or to the acceptor wherever he may be found, so far as the acceptor’s liability is concerned, because the acceptance is held to be general. In order, however, to preserve recourse against the drawer and indorsers, the presentment for payment must be made at the place specified. If the acceptance be to pay at a specified place, and there only, the presentment for payment must be made at that place in all cases.

SUBSECTION (5).—*Duties of Holder as to Qualified Acceptance.*

**486.** The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance. Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorised the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill. This does not apply to a partial acceptance whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance. When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto (s. 44).

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<sup>1</sup> *Smith v. Vertue*, 1860, 30 L.J.C.P. 56.

SUBSECTION (6).—*Is the Debtor of the Drawer bound to Accept ?*

**487.** The question has been raised, is a debtor of the drawer bound to accept bills drawn on him, to the amount of the debt, under the penalty of damages for non-acceptance ?<sup>1</sup> The acceptor of a bill is in a very different position from an ordinary debtor, and it is difficult to see why he should be obliged to grant additional powers to his creditor. In England it is quite settled that a drawee, although in possession of funds of the drawer, is not bound to accept unless by his own agreement or consent.<sup>2</sup>

SUBSECTION (7).—*Effect of Presentment.*

**488.** The mere presentment of the bill for acceptance makes in Scotland a material alteration in the rights of parties. Where the drawee of a bill has in his hands funds available for the payment thereof, the presentment of the bill operates as an assignation intimated of the sum for which it is drawn in favour of the holder, from the time when the bill is presented to the drawee (s. 53 (2)). A bill so drawn and presented can only carry money belonging to the drawer in the hands of the drawee due at the date of presentment. But if the money is due, though not payable at the date of the presentment of the bill, it will still be held to be assigned as at that date.<sup>3</sup> The acceptance of a bill payable at a banker's is authority to the banker to pay the bill to the extent of the balance at the acceptor's credit when the bill is presented for payment. As, however, the banker incurs some risk in so paying, he is not bound to do so unless he has so agreed with his customer.

SUBSECTION (8).—*Liability of Acceptor.*

**489.** The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance (s. 54 (1)). He becomes the party primarily liable thereon to the holder, and the drawer and indorsers are practically in the position of cautioners for him.

**490.** The acceptor is precluded from denying to a holder in due course : (a) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement (s. 54 (2)). The acceptor may, of course, decline to pay on the ground that the payee's signature has been forged. If, however, the payee be a fictitious person, the holder is entitled to treat the bill as if drawn payable to bearer, and if the acceptor pays the bill to bearer the bill is discharged.

<sup>1</sup> Thomson on Bills, 2nd ed., 228, and authorities there cited.

<sup>2</sup> Chitty on Bills, p. 200 ; *Goodwin v. Roberts*, 1875, L.R. 10 Ex. at p. 351.

<sup>3</sup> *Carter v. McIntosh*, 1862, 24 D. 925.

## SECTION 11.—ACCEPTANCE FOR HONOUR.

SUBSECTION (1).—*Definition and Requisites.*

**491.** Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (s. 65 (1)). A bill may be accepted for honour for part only of the sum for which it is drawn (s. 65 (2)). An acceptance for honour *supra* protest in order to be valid must (a) be written on the bill, and indicate that it is an acceptance for honour; and (b) be signed by the acceptor for honour (s. 65 (3)).

**492.** Acceptance for honour is equivalent to saying to the holder of the bill "Don't return it, and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me and you shall have the money."<sup>1</sup> The usual form is, "Accepted for the honour of A, S.P.," or simply "Accepted, S.P." It is usual for an acceptance for honour to be attested by a notarial "Act of honour" recording the transaction.<sup>2</sup> Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer (s. 65 (4)). The holder may refuse an acceptance for honour and proceed at once against the parties liable on the bill. In all cases of acceptance or payment for honour where protest is required, it is sufficient that the bill has been noted for protest, without a formal protest being extended (s. 93).

SUBSECTION (2).—*Maturity of the Bill.*

**493.** Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour (s. 65 (5)).

SUBSECTION (3).—*Liability of Acceptor for Honour.*

**494.** The acceptor for honour of a bill by accepting it engages that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment and protested for non-payment and that he receives notice of these facts. The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted (s. 66 (2)).

<sup>1</sup> *Williams v. Germaine*, 1827, 7 B. & C. 468, per Tenterden C.J. at p. 477.

<sup>2</sup> Chalmers on Bills, 8th ed., 260.



## SECTION 12.—NEGOTIATION OF BILLS.

SUBSECTION (1).—*How effected.*

**495.** A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill. A bill payable to bearer is negotiated by delivery. A bill payable to order is negotiated by the indorsement of the holder completed by delivery. Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor. Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability (s. 31).

**496.** The nature of negotiation is thus described by Lord (then Mr. Justice) Blackburn: "In the notes to *Miller v. Race*,<sup>1</sup> where all the authorities are collected, the very learned author says: 'It may therefore be laid down as a safe rule that where an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, there it is entitled to the name of a negotiable instrument, and the property in it passes to a *bona fide* transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, *i.e.* if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a negotiable instrument, nor will delivery of it pass the property of it to a vendee, however *bona fide*, if the transferor himself have not a good title to it, and the transfer be made out of market overt.' Bills of exchange and promissory notes, whether payable to order or to bearer, are by the law merchant negotiable in both senses of the word. The person who by a genuine indorsement, or, where it is payable to bearer, by a delivery, becomes holder, may sue in his own name on the contract, and if he is a *bona fide* holder for value, he has a good title, notwithstanding any defect of title in the party (whether indorser or deliverer) from whom he took it."<sup>2</sup> In Scotland "indorsement carries the bill only, but leaves untransmitted the diligence which may have been raised on it, and has no effect in transferring dividends due on the bill out of a sequestrated estate, or any guarantee or other collateral obligation or security."<sup>3</sup>

SUBSECTION (2).—*Requisites of Indorsement.*

**497.** An indorsement in order to operate as a negotiation must comply with the following conditions, namely, it must be written on

<sup>1</sup> 1758, 1 Smith L.C. 525.

<sup>2</sup> *Crouch v. Crédit Foncier*, 1873, L.R. 8 Q.B. at p. 381.

<sup>3</sup> Bell, Prin. s. 331.

the bill itself and be signed by the indorser. The simple signature of the indorser on the bill without additional words is sufficient. An indorsement written on an allonge, or on a "copy" of a bill issued or negotiated in a country where "copies" are recognised, is deemed to be written on the bill itself (s. 32 (1)). An allonge (French, *allonger*, to lengthen) is a piece of paper annexed to a bill of exchange for the purpose of containing additional indorsements, in the event of there being no further space available on the back of the bill itself. An allonge does not require an additional stamp. Allonges are met with in cases where the bill has a long currency, and where, consequently, it passes through the hands of many parties before it becomes payable. To prevent the allonge being detached and possibly used in connection with another bill, the first signature upon it is usually written partly upon the bill and partly upon the allonge.

**498.** "Copies" of a bill must be distinguished from the parts of a set. They are not often seen in this country. The practice concerning them is summed up in Articles 66 and 67 of the Hague Uniform Regulation, prepared by the International Conferences held at the Hague in 1910 and 1912, with a view to unifying the various systems of bills of exchange law prevailing in the main commercial countries of the world.

**499.** An indorsement must be an indorsement of the entire bill. A partial indorsement, that is to say an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill (s. 32 (2)). Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse unless the one indorsing has authority to indorse for the others (s. 32 (3)). Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is misspelt, he may indorse the bill as therein described, adding if he thinks fit his proper signature (s. 32 (4)). Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved (s. 32 (5)).

#### SUBSECTION (3).—*Conditional Indorsement.*

**500.** Where a bill purports to be indorsed conditionally, the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not (s. 33).

#### SUBSECTION (4).—*Indorsement in Blank and Special.*

**501.** An indorsement may be made in blank or special (s. 32 (6)). An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer. A special indorsement specifies the person to whom or to whose order the bill is to be payable. The provisions of the Act relating to a payee apply, with the necessary modifications, to

an indorsee under a special indorsement. When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement, by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person (s. 34).

SUBSECTION (5).—*Restrictive Indorsement.*

**502.** An indorsement may contain terms making it restrictive (s. 32 (6)). An indorsement is restrictive which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof; as for example, if a bill be indorsed "Pay D only," or "Pay D for the account of A," or "Pay D or order for collection." A restrictive indorsement gives the indorsee the right to receive payment of the bill, and to sue any party thereon that the indorser could have sued, but gives him no power to transfer his rights as indorsee, unless it expressly authorises him to do so. Where a restrictive indorsement authorises further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement (s. 35).

SUBSECTION (6).—*Negotiation of Overdue or Dishonoured Bill.*

**503.** Where a bill is negotiable in its origin, it continues to be negotiable until it has been (a) restrictively indorsed, or (b) discharged by payment, or otherwise. When an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person had from whom he took it. A bill payable on demand is deemed to be overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact. Except where an indorsement bears date after the maturity of the bill, every negotiation is, *prima facie*, deemed to have been effected before the bill was overdue. Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour, takes it subject to any defect of title attaching thereto at the time of dishonour; but this provision is not to affect the rights of a holder in due course (s. 36).

SUBSECTION (7).—*Negotiation to Party already Liable.*

**504.** Where a bill is negotiated back to the drawer, or to a prior indorser, or to the acceptor, such party may, subject to the provisions of the Act, reissue, and further negotiate the bill; but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable (s. 37).



SUBSECTION (8).—*Stipulations by Drawer or Indorser.*

**505.** The drawer of a bill and any indorser may insert therein an express stipulation (1) negating or limiting his own liability to the holder, (2) waiving as regards himself some or all of the holder's duties (s. 16). Thus he may insert the words "without recourse to me," or any equivalent expression.

## SECTION 13.—LIABILITIES OF PARTIES.

SUBSECTION (1).—*The Acceptor.*

**506.** The acceptor of a bill, by accepting it, engages that he will pay it according to the tenor of his acceptance (s. 54 (1)). He is precluded from denying to a holder in due course (a) the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill; (b) in the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement; (c) in the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement (s. 54 (2)). If the payee be a fictitious person, the holder is entitled to treat the bill as if drawn payable to bearer (s. 7 (3)).

SUBSECTION (2).—*The Drawer.*

**507.** The drawer of a bill by drawing it (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, providing that the requisite proceedings on dishonour be duly taken; (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (s. 55 (1)). The drawer and indorsers of a bill are practically in the position of cautioners for the acceptor, and are entitled to all the equities of a cautioner when the bill has been dishonoured, though not before.<sup>1</sup>

SUBSECTION (3).—*Indorsers.*

**508.** The indorser of a bill, by indorsing it, engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser, who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken. He is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements, and is precluded from denying to his immediate or a subsequent indorsee that

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<sup>1</sup> *Duncan, Fox & Co. v. N. & S. Wales Bank*, 1880, L.R. 6 App. Cas. at p. 19.



the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto (s. 55 (2)). In a question with the holder, the indorser is in the position of a drawer of a fresh bill, and has the liabilities of such. Defects in the signatures of parties prior to him have no effect on his liability to the holder.

#### SUBSECTION (4).—*Aval*.

**509.** Where a party signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course (s. 56). By the custom of merchants there may be an indorsement by a person, not a holder of the bill, who puts his name on the bill to facilitate the transfer by a holder. This may be done by what is called an “aval,” and if such an aval is given by anyone, his obligation to all subsequent holders of the bill is precisely the same as that of the person to facilitate whose transfer the aval is given. Such an indorsement creates no obligation to those who previously were parties to the bill; it is solely for the benefit of those who take subsequently. It is not a collateral engagement, but one on the bill, and it is for that reason, and because the original bill has incident to it the capacity of an endorsement in the nature of an aval, that such an indorsement requires no new stamp.<sup>1</sup> The name seems to be derived from the French *faire valoir*, because this act of the third party in putting his name on the bill gives it a value which it had not before. In the case of *Macdonald v. The Union Bank*, cited, the cashier of the Union Bank refused to give cash on the credit of a cheque drawn on another bank until Macdonald indorsed his name on it. This was held to make Macdonald liable as indorser to the Union Bank.

#### SUBSECTION (5).—*Liabilities inter se of Indorsers*.

**510.** The liabilities *inter se* of successive indorsers of a bill must, in the absence of evidence to the contrary, be determined according to the ordinary principles of the law merchant, whereby a prior endorser must indemnify a subsequent one. But the whole circumstances attendant upon the making, issue, and transference of a bill or note may be legitimately referred to for the purpose of ascertaining the true relation to each other of the parties who put their signatures upon it, either as drawers or indorsers; and reasonable inferences derived from these facts and circumstances are admitted to the effect of qualifying, altering, or even inverting the relative liabilities which the law merchant would otherwise assign to them. Thus, where three directors of a company mutually agreed with each other to become sureties to a bank for the same debts of a company, and in pursuance of that agreement successively endorsed three promissory notes of the company, it was

<sup>1</sup> *Walker's Trs. v. M'Kinlay*, 1880, 7 R. (H.L.) 85; *Macdonald v. Union Bank*, 1864, 2 M. 963.

held that they were entitled and liable to equal contribution *inter se*, and that they were not liable to indemnify each other successively according to the priority of their indorsements.<sup>1</sup> As regards a holder in due course, indorsers are liable jointly and severally.

#### SECTION 14.—TRANSFEROR BY DELIVERY.

##### SUBSECTION (1).—*Definition.*

**511.** Where the holder of a bill payable to bearer negotiates it by delivery, without indorsing it, he is called a transferor by delivery. A transferor by delivery is not liable on the instrument. A transferor by delivery who negotiates a bill, thereby warrants to his immediate transferee, being a holder for value, that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless (s. 58).

##### SUBSECTION (2).—*Liability.*

**512.** Where the holder of a bill which has been indorsed in blank discounts it with a bank without indorsing it, and the bill is subsequently dishonoured, he is not bound to repay the sum received.<sup>2</sup> He is not liable on the bill, and accordingly does not stand in the position of cautioner for the acceptor, nor does he by transferring the bill warrant the solvency of the parties whose names are on it. He is a seller of the bill, and in many respects he is in the same position as a seller of any other kind of goods. But if there is any inherent defect in the bill, *e.g.* where the amount has been fraudulently altered by a previous holder,<sup>3</sup> or where the signatures of the drawer and acceptor turn out to be forgeries,<sup>4</sup> the bank can recover the money they paid in discounting the bill from the party who received it. In neither case is the bill what it purports to be.

##### SUBSECTION (3).—*Effect of Transfer.*

**513.** The transfer divests the transferor of all title to the bill, and invests the transferee with the title of the transferor. The transferee acquires the title of the transferor and nothing more. As in an assignation, the maxim *utitur jure auctoris* applies.<sup>5</sup>

#### SECTION 15.—FORGED OR UNAUTHORISED SIGNATURE.

##### SUBSECTION (1).—*Effect.*

**514.** Subject to the provisions of the Act, where a signature on a bill is forged or placed thereon without the authority of the person

<sup>1</sup> *Macdonald v. Whitfield*, 1883, L.R. 8 App. Cas. 733.

<sup>2</sup> *Yates v. Hoppe*, 1850, 19 L.J.C.P. 180.

<sup>3</sup> *Jones v. Ryde*, 1814, 5 Taunt. 488; *Burchfield v. Moore*, 1854, 23 L.J.Q.B. 261.

<sup>4</sup> *Fuller v. Smith*, 1824, Ry. & M. 49. <sup>5</sup> *Hood v. Stewart*, 1890, 17 R. 749.

whose signature it purports to be, the forged or unauthorised signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor or to enforce payment thereof against any party thereto can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority. Nothing in this section is to affect the ratification of an unauthorised signature not amounting to a forgery (s. 24). The provisions of the Act referred to are those contained in s. 60 relating to demand drafts on a banker, and s. 82 relating to a banker who collects a crossed cheque for a customer.

**515.** No one can obtain any right whatever to a bill in cases where the signature of any prior party is forged. The holder cannot enforce payment against any party, and should any party pay him, the payment is invalid, and the money must be paid over again to the true owner of the bill, that is to say to the party whose name has been forged. So where a bill is accepted payable at the acceptor's bank, and the bank pays to a holder who has obtained it through a forged signature, the bank cannot debit the acceptor's account with the payment. If the payee is a fictitious person the bill may be treated as payable to bearer (s. 7 (3)), and if the bank where the bill is made payable pays it to bearer it can debit the payment to the acceptor's account.<sup>1</sup>

**516.** A forged signature cannot be ratified. A forger does not act, and does not purport to act, on behalf of the person whose name he forges. There is, therefore, nothing on which ratification can be grounded.<sup>2</sup> So where a party whose name is forged writes, "I hold myself responsible for the note bearing my signature," the ratification is invalid, and he is not liable on the note.<sup>3</sup>

#### SUBSECTION (2).—*Adoption of Forged Signature.*

**517.** But the party against whom it is sought to enforce payment of the bill may be precluded from setting up the forgery or want of authority. So if he writes to say that the signature is his, he cannot go back on that and he is liable on the bill.<sup>4</sup> But if when asked whether his signature is genuine he is merely silent, this in itself will not make him liable. A person is not legally bound to answer such questions, and does not incur any liability by not answering letters addressed to him by persons to whom he stands in no special relation.<sup>5</sup> If, however, the party knows that his silence may lead to the position being altered

<sup>1</sup> *Bank of England v. Vagliano Bros.*, [1891] A.C. 107.

<sup>2</sup> *Chalmers on Bills*, 8th ed., 85.

<sup>3</sup> *Brook v. Hook*, 1871, L.R. 6 Ex. 89; Cf. *Williams v. Bayley*, 1866, L.R. 1 H.L. 200, at p. 221.

<sup>4</sup> *Brook v. Hook*, *supra*; *Roberts v. Tucker*, 1851, 16 Q.B. at p. 577.

<sup>5</sup> *British Linen Co. v. Cowan*, 1906, 8 F. 704; *M'Kenzie v. British Linen Co.*, 1881, 8 R. (H.L.) 8.

to the prejudice of his questioner, and if it is so altered, he may be precluded from setting up that his signature was forged.<sup>1</sup>

SUBSECTION (3).—*Ratification of Unauthorised Signature.*

**518.** Nothing in the section affects the ratification of an unauthorised signature not amounting to a forgery; that is, nothing prevents a signature, not forged but adhibited without authority, from being subsequently ratified, so as to preclude the person so ratifying from pleading that it had been adhibited without his authority.

SUBSECTION (4).—*Banker paying Demand Draft whereon Indorsement is Forged.*

**519.** The heavy responsibility thus put upon bankers has led to a modification of the law in their favour in the case of demand drafts, where it is impossible for them to make the inquiries as to the genuineness of the signatures on the instrument which are necessary for their protection. This modification is made by s. 60 of the Act, which provides as follows: When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee or any subsequent indorsement was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority (s. 60). In such cases the bank can debit the drawer's account with the amount so paid. But the section does not protect the bank in a case where it is the drawer's signature that is forged. The bank knows his signature or has the means of instantly verifying it.

SUBSECTION (5).—*Recovery of Money paid on a Forged Bill.*

**520.** If an acceptor discovers after he has paid a bill that it is a forgery, he may in general by giving notice on the same day or within a reasonable time recover back the money.<sup>2</sup> So, too, if a forged note be discounted, the transferee on discovery of the forgery within a reasonable time may recover back the money paid.<sup>3</sup> But any fault or negligence on the part of him who pays the money will disable him from recovering.

SECTION 16.—PRESENTMENT FOR PAYMENT.

SUBSECTION (1).—*Necessity of Presentment.*

**521.** A bill must be duly presented for payment. If it be not so presented, the drawer and indorsers shall be discharged (s. 45). A bill

<sup>1</sup> Cases cited above. *Ewing & Co. v. Dominion Bank*, [1904] A.C. 806.

<sup>2</sup> *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49.

<sup>3</sup> *Jones v. Ryde*, 1814, 5 Taunt. 488; *Gurney v. Womersley*, 1854, 4 E. & B. 133.



is duly presented for payment which is presented in accordance with the following rules.

SUBSECTION (2).—*Time of Presentment.*

**522.** Where the bill is not payable on demand, presentment must be made on the day it falls due. Where the bill is payable on demand, then presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable. In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case (s. 45 (1) and (2)).

**523.** Presentment must be made by the holder or by some person authorised to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorised to pay or refuse payment on his behalf, if with the exercise of reasonable diligence such person can there be found (s. 45 (3)). If a bill be payable at a bank it must be presented within banking hours, if at a trader's place of business then within ordinary business hours, if at a private house, probably a presentment up to bedtime would be sufficient.<sup>1</sup> All days are business days, except (a) Sunday, Good Friday, Christmas Day, (b) a bank holiday under the Bank Holidays Act, 1871, or Acts amending it; (c) a day appointed by royal proclamation as a public fast or thanksgiving day (s. 92).

**524.** Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

SUBSECTION (3).—*Place of Presentment.*

**525.** A bill is presented at the proper place :—

(a) Where a place of payment is specified in the bill and the bill is there presented (s. 45 (4)). A place of payment may be specified by the drawer in the body of the bill or by the acceptor in his acceptance, or in a memorandum annexed to the bill. If the place of payment be specified by the acceptor in his acceptance, it is necessary that it should be presented for payment at that place, in order to preserve recourse against the drawer and indorsers. As against the acceptor, however, presentment to him wherever he may be found is sufficient, unless the acceptance bears that payment is to be made at the place specified only. In this connection it is to be noted that when a bill is made payable in London or any other large town, the holder may insist that the drawee

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<sup>1</sup> Chalmers on Bills, 8th ed., 165.

should subjoin to his acceptance some house where it will be paid, as the holder may not otherwise know where to find him, and if he refuse, the holder should protest for non-acceptance.<sup>1</sup> Presentment for payment at the place specified in the acceptance is sufficient against the drawer or indorsers without going to the acceptor personally.<sup>2</sup>

(b) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

(c) Where no place of payment is specified, and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

(d) In any other case, if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

**526.** Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorised to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required. Where a bill is drawn upon or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all. Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found. Where authorised by agreement or usage, a presentment through the post office is sufficient (s. 45 (5) to (8)).

#### SUBSECTION (4).—*When Dispensed with.*

**527.** Presentment for payment is dispensed with :—

(a) Where, after the exercise of reasonable diligence, presentment, as required by the Act, cannot be effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

(b) Where the drawee is a fictitious person.

(c) As regards the drawer, where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

(d) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

(e) By waiver of presentment, express or implied (s. 46).

#### SUBSECTION (5).—*Duties of Holder as regards Acceptor.*

**528.** As to the liability of the acceptor, as distinguished from the liability of the drawer and indorsers, when a bill is accepted generally,

<sup>1</sup> *Gregory v. Walcup*, 1700, Comyns, 76; *Mutford v. Walcot*, 1698, 1 Lord Raym. 574.

<sup>2</sup> *Hawkes & Ors. v. Salter*, 1828, 4 Bing. 715.

presentment for payment is not necessary in order to render the acceptor liable (s. 52 (1)). The acceptor is the primary obligant on the bill, and that obligation continues until the bill is discharged or is brought to an end by the sexennial prescription.<sup>1</sup> When, however, the acceptance is to pay only at a particular specified place, presentment for payment at that place is required before the holder can sue the acceptor.<sup>2</sup> But the acceptor is not discharged by the omission to present the bill for payment on the day that it matures (s. 52 (2)). Summary diligence may competently proceed against the acceptor of a bill which has not been presented for payment on the day when it falls due but only within six months thereafter. This was the law and practice of Scotland prior to the Act and is not altered by the Act.<sup>3</sup>

**529.** In order to render the acceptor of a bill liable, it is not necessary to protest it, or that notice of dishonour should be given to him (s. 52 (3)).

**530.** Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when the bill is paid, the holder shall forthwith deliver it up to the party paying it (s. 52 (4)). The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer.<sup>4</sup> Payments to account are usually marked on the back of the bill and initialed by the person receiving the money.

#### SUBSECTION (6).—*Duties as regards Acceptor for Honour.*

**531.** Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour or referee in case of need (s. 67 (1)). Effects often reach the drawee who has refused acceptance in the first instance, out of which the bill may and would be satisfied, if presented to him again when the period of payment had arrived.<sup>5</sup> Therefore it must be presented for payment and protested for non-payment if payment is refused.

**532.** Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him (s. 67 (2)). Delay in presentment, or non-presentment, is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment (s. 67 (3)). When a bill of

<sup>1</sup> *Smith v. Vertue*, 1860, 30 L.J.C.P. at p. 60.

<sup>2</sup> *Halstead v. Skelton*, 1843, 5 Q.B. at p. 93; but see *Smith v. Vertue*, *supra*.

<sup>3</sup> *M'Neill v. Innes, Chambers & Co.*, 1917 S.C. 540.

<sup>4</sup> *Hansard v. Robinson*, 1827, 7 B. & C. at p. 94.

<sup>5</sup> *Hoare v. Cazenove*, 1812, 16 East, per Lord Ellenborough at p. 398.



exchange is dishonoured by the acceptor for honour it must be protested for non-payment by him (s. 67 (4)).

### SECTION 17.—PAYMENT AND DISCHARGE.

#### SUBSECTION (1).—*General.*

**533.** A bill is discharged when all rights of action thereon are extinguished. It then ceases to be negotiable, and if it subsequently comes into the hands of a holder in due course, he acquires no right of action on the instrument.<sup>1</sup>

#### SUBSECTION (2).—*Payment in due course.*

**534.** A bill is discharged by payment in due course by or on behalf of the drawee or acceptor. "Payment in due course" means payment made at or after the maturity of the bill to the holder thereof in good faith and without notice that his title to the bill is defective (s. 59 (1)). Payment, in order to operate as a discharge of the bill, must be made by or on behalf of the drawee or acceptor. It must also be made to the holder, or some person authorised to receive payment on his behalf. Holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof (s. 2). So where a bill indorsed in blank is stolen, and the thief presents it to the acceptor at maturity and obtains payment, if the acceptor pays him in good faith the bill is discharged, because the thief is the holder; the true owner of the bill has no further claim upon it against the acceptor.<sup>2</sup> But the payment must have been made without knowledge or suspicion of the infirmity of the holder's title, and not under circumstances which might reasonably awaken the suspicions of a prudent man, or out of the usual course of business. Again, where the indorsee has obtained it by fraud, if he presents it at maturity to the acceptor, who pays him in good faith, the bill is discharged. If, however, the holder derives his title through a forged signature, payment to him does not discharge the bill, and the acceptor remains liable to pay over again to the true owner, that is to say, to the party whose signature was forged. An exception is made as to this in the case of payment by bankers of bills drawn on them payable to order on demand.<sup>3</sup>

**535.** When a bill is specially indorsed, the acceptor may be in doubt as to the identity of the party who presents the bill for payment. He can then offer to pay under an indemnity.

#### SUBSECTION (3).—*Payment before Maturity.*

**536.** Payment made before the maturity of a bill does not discharge it. So if the acceptor so pays it he may reissue it. If it is stolen from

<sup>1</sup> Chalmers on Bills, 8th ed., 227.

<sup>2</sup> *Smith v. Sheppard*, cited Chitty on Bills, 10th ed., 278.

<sup>3</sup> Para. 519, *supra*.



him and transferred to a holder in due course, he may have to pay the amount over again.

SUBSECTION (4).—*Payment by Drawer or Indorser.*

**537.** When a bill is paid by the drawer or an indorser it is not discharged ; but (a) where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill. (b) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill (s. 59 (2)).

Where an accommodation bill is paid in due course by the party accommodated, the bill is discharged (s. 59 (3)). It has done its work and is no longer a negotiable instrument.<sup>1</sup>

SUBSECTION (5).—*Proof of Payment.*

**538.** In Scotland payment of a bill can in the general case be proved only by the writ or oath of the creditor. A receipt ought to be written on the bill. A receipt distinct from the bill will not prevent an onerous holder from recovering second payment.<sup>2</sup> In some cases payment may be held proved *rebus ipsis et factis*, as where a promissory note had been allowed to lie over for years, but short of the sexennial prescription, there being other circumstances from which payment was to be presumed. So the possession of a bill by the proper debtor will in general create a presumption *per se* that he has paid it, although this presumption may be redargued by evidence that he obtained possession by accident or fraud.<sup>3</sup>

SUBSECTION (6).—*Acceptor the Holder at Maturity.*

**539.** When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged (s. 61). The expression "in his own right" is not used in contradistinction to a right in a representative capacity, but indicates a right not subject to that of another person, and good against all the world.<sup>4</sup> It is only when the acceptor obtains a right of this kind that the bill is discharged. But, of course, if the acceptor becomes the holder as executor, trustee or in other similar capacity, the bill is not discharged. Where a bill is granted for an advance on loan, the mere granting of a new bill and the giving up of the old bill do not operate a discharge of the claim for interest upon the loan from the beginning.<sup>5</sup>

<sup>1</sup> *Lazarus v. Cowie*, 1843, 3 Q.B. 459.

<sup>3</sup> *Edward v. Fyfe*, 1823, 2 S. 431.

<sup>5</sup> *Hope Johnston v. Cornwall*, 1895, 22 R. 314.

<sup>2</sup> *Thompson on Bills*, 2nd ed., 189.

<sup>4</sup> *Nash v. de Freville*, [1900] 2 Q.B. 72.

SUBSECTION (7).—*Renunciation by Holder.*

**540.** When the holder of a bill, at or after its maturity, absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged. The renunciation must be in writing, unless the bill is delivered up to the acceptor. The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity, but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation (s. 62). The renunciation in writing required by the statute must be in itself a record of the renunciation, not a memorandum or note of the renunciation, or of an intention or desire to renounce.<sup>1</sup> An agreement not to sue the acceptor, but reserving entire the claims of the holder against any obligants other than the acceptor, does not discharge the bill, and the holder can sue an indorser, who will have his recourse against the acceptor.<sup>2</sup> Renunciation may be made conditional, and until the condition is purified there is no renunciation.<sup>3</sup>

SUBSECTION (8).—*Cancellation by Holder.*

**541.** Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged. In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled is also discharged. A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority (s. 63). If an agent cancels a bill without the authority of his principal, he will be liable for the loss sustained by the principal. Such loss may arise from the principal being no longer able to execute summary diligence owing to the bill being so dealt with.<sup>4</sup>

SUBSECTION (9).—*Alteration of Bill.*

**542.** Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided, except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers. Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its

<sup>1</sup> *In re George, Francis v. Bruce*, 1890, L.R. 44 Ch.D. 627.

<sup>2</sup> *Muir v. Crawford*, 1875, 2 R. (H.L.) 148.      <sup>3</sup> *Macvean v. Maclean*, 1873, 11 M. 764.

<sup>4</sup> *Bank of Scotland v. Dominion Bank*, 1891, 18 R. (H.L.) 21; *Dominion Bank v. Anderson*, 1888, 15 R. 408.

original tenor (s. 64 (1)). A bill was accepted for £500 on a stamp sufficient to cover £4000, and after acceptance the drawer fraudulently altered the amount to £3500. The bill came into the hands of a holder in due course, and he was held entitled to recover the original sum of £500.<sup>1</sup> In this case the holder pled that the acceptor was liable for the £3500, because of his negligence in accepting a bill which was so written that it was possible to alter the amount. The House of Lords held that the acceptor owed no duty to a holder of the bill and was not bound to take precautions against fraudulent alterations in the bill after acceptance. Other considerations rule cases of this kind when they arise between a bank and a customer.<sup>2</sup>

**543.** In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent (s. 64 (2)). Any alteration seems material which would alter the business effect of the instrument if used for any business purpose.<sup>3</sup> A mere correction is not a material alteration, nor is the addition of words which do not alter the effect of the bill as issued.<sup>4</sup>

**544.** An alteration by the drawer and payee of a bill payable to drawer's order, or the payee of a note, though it avoids the instrument, does not extinguish the debt. There is no reason why it should do so, for the alteration in no way injures the acceptor or maker. But an alteration made by an indorsee not only avoids the security as against all parties, but also extinguishes the debt due to the indorsee by the indorser. The alteration has destroyed the instrument on which the indorser could have claimed against the prior parties on the bill, and the indorsee's claim against him is therefore discharged.<sup>5</sup>

#### SECTION 18.—PAYMENT FOR HONOUR.

##### SUBSECTION (1).—*Payment for Honour supra Protest.*

**545.** Where a bill has been protested for non-payment, any person may intervene and pay it *supra protest* for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn (s. 68 (1)). Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference (s. 68 (2)). Thus a payment for the honour of the acceptor is preferable to one for the honour of the drawer, and a payment for the honour of the drawer to one for the honour of an indorser, and of a prior to a later indorser.

<sup>1</sup> *Scholfield v. Londesborough*, [1896] A.C. 514.

<sup>2</sup> Para. 626, *infra*.

<sup>3</sup> *Suffell v. Bank of England*, 1882, L.R. 9 Q.B.D., per Brett L.J. at p. 568.

<sup>4</sup> But see *Bank of Montreal v. Exhibit and Trading Co.*, 1906, 11 Com. Cas. 250, as to adding the word "Limited" to the name of an unincorporated company.

<sup>5</sup> *Alderson v. Langdale*, 1832, 3 B. & Ad. 660.



SUBSECTION (2).—*Act of Honour.*

**546.** Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour, which may be appended to the protest or form an extension of it (s. 68 (3)). The notarial act of honour must be founded on a declaration made by the payer for honour or his agent in that behalf, declaring his intention to pay the bill for honour and for whose honour he pays (s. 68 (4)).

SUBSECTION (3).—*Effect of Payment.*

**547.** Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of the holder, as regards the party for whose honour he pays, and all parties liable to that party (s. 68 (5)). Suppose a dishonoured bill is held by the fifth indorsee. If X pays it *supra* protest for the honour of the acceptor, he acquires a right to reimbursement against the acceptor alone; if he pays for the honour of the first indorser, he can sue the first indorser and the drawer (provided they have due notice) and the acceptor, but the second and subsequent indorsers are discharged. Again, suppose a bill accepted for the accommodation of the drawer. It is dishonoured and paid *supra* protest by X for the honour of the drawer. X cannot recover from the accommodation acceptor, for he is not a party liable to the drawer.<sup>1</sup>

**548.** The payer for honour, on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour, is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up, he shall be liable to the payer for honour in damages (s. 68 (6)). Where the holder of a bill refuses to receive payment *supra* protest, he shall lose his right of recourse against any party who would have been discharged by such payment (s. 68 (7)).

## SECTION 19.—DISHONOUR BY NON-PAYMENT.

SUBSECTION (1).—*Definition.*

**549.** A bill is dishonoured by non-payment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained; or (*b*) when presentment is excused and the bill is overdue and unpaid. When a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder (s. 47). A right of recourse does not mean an immediate right of action.<sup>2</sup> The cause of action is not complete till the expiration of the day of payment.<sup>3</sup>

<sup>1</sup> Chalmers on Bills, 8th ed., 265.

<sup>2</sup> *Kennedy v. Thomas*, [1894] 2 Q.B. at p. 765.

<sup>3</sup> *Gelmini v. Moriggia*, [1913] 2 K.B. 549.



SUBSECTION (2).—*Notice of Dishonour.*

**550.** When a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged. Provided that—(1) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission; (2) where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted (s. 48).

SUBSECTION (3).—*Rules as to Notice.*

**551.** Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules:—

(1) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2) Notice of dishonour may be given by an agent, either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not. A creditor who holds a bill as a collateral security is bound to present and give notice of dishonour, and is liable for the consequences if he omit to do so.<sup>1</sup>

(3) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.

(5) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8) Where notice of dishonour is required to be given to any person, it may be given either to the party himself or to his agent in that behalf.

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<sup>1</sup> *Peacock v. Purssell*, 1863, 32 L.J.C.P. 266.

(9) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative, if such there be, and if with the exercise of reasonable diligence he can be found.

(10) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.<sup>1</sup>

(13) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office (s. 49).

#### SUBSECTION (4).—*Excuses for Delay and Non-notice.*

**552.** Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence (s. 50 (1)).

**553.**—Notice of dishonour is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to, or does not reach, the drawer or indorser sought to be charged (s. 50 (2)). When the holder of a bill does not know where the indorser is to be found, it would be very hard if he

<sup>1</sup> *Fielding & Co. v. Corry*, [1898] 1 Q.B. 268.

lost his remedy by not communicating immediate notice of the dishonour of the bill, and the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance, but if he uses reasonable diligence to discover the residence of the indorser, notice given as soon as this is discovered is due notice of the dishonour of the bill, within the usage and custom of merchants.<sup>1</sup>

(b) By waiver, express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice.

(c) As regards the drawer in the following cases, namely—(1) where drawer and drawee are the same person ; (2) where the drawee is a fictitious person, or a person not having capacity to contract ; (3) where the drawer is the person to whom the bill is presented for payment ; (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill ; (5) where the drawer has countermanded payment.

(d) As regards the indorser in the following cases, namely—(1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill ; (2) where the indorser is the person to whom the bill is presented for payment ; (3) where the bill was accepted or made for his accommodation (s. 50 (2)). The death or bankruptcy of the drawee constitutes no excuse for neglect of notice.<sup>2</sup>

## SECTION 20.—NOTING AND PROTEST.

### SUBSECTION (1).—*When Necessary on Inland Bill.*

**554.** Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be ; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser (s. 51 (1)). When it is proposed to proceed in Scotland by summary diligence, it is always necessary to note and protest. Noting is also of importance both in Scotland and England in other connections. For example, where a bill is payable at a fixed period after sight, the computation of time for payment begins to run from the date of noting or protest, if the bill be noted or protested for non-acceptance or for non-delivery (s. 14 (3)). It is also necessary to note in the case of acceptance or payment for honour (ss. 65 (1), 67 (1), (4)).

### SUBSECTION 2.—*Procedure.*

**555.** Theoretically the procedure is, that a notary public presents the bill for acceptance or payment as the case may be. In practice this

<sup>1</sup> Per Lord Ellenborough in *Bateman v. Joseph*, 1810, 2 Camp. at p. 462.

<sup>2</sup> *Esdaile v. Sowerby*, 1809, 11 East 114; *Boulton v. Stubbins*, 1810, 18 Ves. at p. 21; *Caunt v. Thompson*, 1849, 18 L.J.C.P. at p. 127.



is done by the notary's clerk, who reports to the notary the result. The notary then makes a note or memorandum upon the bill containing the date, the fact of non-acceptance or non-payment (this is usually expressed by writing Pnp in the case of non-payment and Pnac in the case of non-acceptance), his own initials, and the letters N.P. The reason given for not accepting or not paying as reported to the notary is sometimes included in the note, but is not necessary. If not included, a ticket or label is attached to the bill containing these particulars.<sup>1</sup> The noting is a kind of initial protest, which will be sufficient in the meantime if an instrument of protest is regularly extended afterwards (s. 93).

SUBSECTION (3).—*Foreign Bill.*

**556.** Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance, it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment, it must be duly protested for non-payment. If it be not so protested, the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary (s. 51 (2)).

SUBSECTION (4).—*Protest for Non-acceptance and Non-payment.*

**557.** A bill which has been protested for non-acceptance may be subsequently protested for non-payment (s. 51 (3)).

SUBSECTION (5).—*Time for Noting.*

**558.** Subject to the provisions of the Act, when a bill is noted or protested, it may be noted on the day of its dishonour, and must be noted not later than the next succeeding business day. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting (s. 51 (4), as amended by 7 & 8 Geo. V. c. 48). Where the extended protest bore that the bill was protested on a date different from that on which the bill itself bore that the protest was noted, the diligence following thereon was found inept.<sup>2</sup>

SUBSECTION (6).—*Protest for Better Security.*

**559.** Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers (s. 51 (5)). This practice is followed in England, and the holder gives notice of his protest to the drawer and indorsers. This serves only the purpose of notifying the acceptor's situation to the drawer and indorsers, so as to afford them time to make other arrangements for payment.

<sup>1</sup> Brooke's Notary, 6th ed., 82.

<sup>2</sup> *M'Pherson v. Wright*, 1885, 12 R. 942.



It seems to be settled that on the one hand the holder does not lose his recourse against the drawer and indorsers though he should not take such a protest, and on the other hand that if these parties refuse to give better security he cannot sue them on the bill till the term of payment arrives. Such a proceeding was never recognised in Scotland prior to the Act,<sup>1</sup> but it may now be followed as a preliminary to acceptance for honour *supra* protest (s. 65 (1)).

**560.** In Scotland, where during the currency of a bill any of the parties liable on it become *vergens ad inopiam*, the holder may use inhibitions against them so as to prevent their heritable property being disposed of, or use arrestments attaching their moveable property. This, however, is for security only, and the diligence is granted only on an averment of *vergens ad inopiam*, which the person applying for the diligence must take upon himself the responsibility of averring.<sup>2</sup>

#### SUBSECTION (7).—*Place of Protest.*

**561.** A bill must be protested at the place where it is dishonoured. Provided that—(a) when a bill is presented through the post office and returned by post dishonoured, it may be protested at the place to which it is returned, and on the day of its return if received during business hours; and if not received during business hours then not later than the next business day; (b) when a bill drawn payable at the place of business or residence of some person other than the drawer has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to or demand on the drawee is necessary (s. 51 (6)). Where a bill was made payable at the creditor's own office, and on the day of payment the debtor, or someone on his behalf, was not there to pay or refuse payment, the proper form of protest was held to be to record the fact that the drawee or acceptor could not be found at the place of payment, and not to insert in the protest that the bill was "presented at the place where payable to a clerk there, who made answer that no funds had been provided to meet said bill, and payment was refused accordingly."<sup>3</sup>

#### SUBSECTION (8).—*Requisites of Protest.*

**562.** A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify (a) the person at whose request the bill is protested; (b) the place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found (s. 51 (7)). The insertion of names of witnesses in the extended protest is now a mere form, the notary inserting any names he pleases, and the

<sup>1</sup> Thomson on Bills, 2nd ed., 318.

<sup>2</sup> *Dove v. Henderson*, 1865, 3 M. 339; *Symington v. Symington*, 1875, 3 R. 205.

<sup>3</sup> *Bartsch v. Poole*, 1895, 23 R. 328.

witnesses almost never being present.<sup>1</sup> They do not require to sign the protest. Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof (s. 51 (8)).

SUBSECTION (9).—*When Protest dispensed with.*

**563.** Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence (s. 51 (9)).

**564.** Where a dishonoured bill or note is authorised or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill (s. 94). It is a question whether summary diligence may proceed on the certificate of protest under this section.<sup>2</sup> It is understood, however, that the practice at the Register House is to recognise such certificates for that purpose.

SECTION 21.—MEASURE OF DAMAGES AGAINST PARTIES TO DISHONoured BILL.

SUBSECTION (1).—*Bills Dishonoured in this Country.*

**565.** Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows: The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser, (a) the amount of the bill; (b) interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) the expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest (s. 57 (1)). This subsection appears to apply only to bills dishonoured in this country.<sup>3</sup> It does not cover the case of a foreign drawer or indorser who may be liable to the holder for re-exchange when resorted to in his own country. But such drawer or indorser can nevertheless recover from the acceptor in this country such re-exchange.<sup>4</sup> Although a claim of this kind is not referred to in the subsection, it is provided

<sup>1</sup> Thomson on Bills, 2nd ed., 314.

<sup>2</sup> *Sommerville v. Aaronson*, 1898, 25 R. 524.

<sup>3</sup> *Re Commercial Bank of South Australia*, 1887, L.R. 36 Ch.D. 522.

<sup>4</sup> *Ex parte Roberts re Gillespie*, 1885, L.R. 16 Q.B.D. 702; 1886, 18 Q.B.D. 286.

by section 97 (2) of the Act that the rules of the law merchant shall continue to apply to bills of exchange, and under these rules such a claim is good.

**566.** The items of damage (*a*) and (*b*), mentioned in the subsection, can be recovered by summary diligence. Item (*c*) cannot be so recovered because it is illiquid. It must be recovered by action, and may be so recovered, though the principal sum has been recovered by summary diligence.<sup>1</sup> Interest by way of damages is usually given at the rate of 5 per cent.<sup>2</sup> Where by the Act interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper (s. 57 (3)).

SUBSECTION (2).—*Bills Dishonoured Abroad.*

**567.** In the case of a bill which has been dishonoured abroad, in lieu of the above damages the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment (s. 57 (2)). Bills dishonoured abroad fall exclusively under this subsection. The holder cannot at his option claim under subsection (1).<sup>2</sup>

**568.** The term re-exchange is used here in a technical sense, and means the amount of money which, when paid to the holder of a bill payable abroad and dishonoured there, will put the holder in the same position as if the bill had been honoured. Suppose a merchant in London indorses a bill for a certain number of Austrian crowns, payable at a future date in Vienna. The holder is entitled to receive in Vienna, on the day of the maturity of the bill, a certain number of Austrian crowns. Suppose the bill to be dishonoured. The holder is now, by the custom of merchants, entitled to immediate and specific redress by his own act in this way. He is entitled, being in Vienna, then and there to raise the exact number of Austrian crowns by drawing and negotiating a cross bill, payable at sight on his indorser in London, for as much English money as will purchase in Vienna the exact number of Austrian crowns at the rate of exchange on the day of dishonour, and to include in the amount of that bill the interest and necessary expenses of the transaction. The amount for which it is drawn is called in this country re-exchange. In practice a cross bill is seldom drawn, but the right of the holder to draw it is settled by the law merchant of all nations, and it is only by a reference to this supposed bill that the re-exchange—in other words, the true damages in an action on the original bill—can be properly understood and computed. Re-exchange includes, besides the actual amount of the bill and interest from the date of protest, bank

<sup>1</sup> Hamilton on Bills, 217; *Gibson v. Anderson*, 1846, 9 D. 1, per Lord Pres. Boyle at p. 4.

<sup>2</sup> *Re Commercial Bank of South Australia*, 1887, L.R. 36 Ch.D. at p. 529.



commission and brokerage, expenses of journeys when requisite to obtain payment, the amount of the stamp if a redraft be actually drawn, and the cost of postage of letters which the default of payment rendered it necessary to write.<sup>1</sup> Re-exchange is not recoverable by summary diligence. The amount is illiquid, depending on the rate of exchange on the date of dishonour.

## SECTION 22.—SUMMARY DILIGENCE.

### SUBSECTION (1).—*Saving of Scottish Practice.*

**569.** Nothing in the Act or in any repeal effected thereby shall extend or restrict or in any way alter or affect the law and practice in Scotland in regard to summary diligence (s. 98). Summary diligence was introduced into the law of Scotland by the Acts 1681, c. 20, 1696, c. 36, and 12 Geo. III. c. 72, s. 42. The combined effect of these Acts was as follows: In the case of all bills and promissory notes, inland and foreign, it was made competent, after they have been duly protested for non-acceptance or non-payment as the case may be, to register the protest, having the bill or note prefixed, within six months after the date of the bill or note in case of non-acceptance, or after the falling due thereof in case of non-payment, in the Books of Council and Session, or other competent judicatures, at the instance of the person to whom the same is made payable or his order, either against the drawer and indorsers in case of a protest for non-acceptance, or against the acceptor and the drawer and indorsers in case of a protest for non-payment, to the effect it may have the authority of the judges thereof interponed thereto, that letters of horning upon a simple charge of six days and executorials necessary may pass thereupon. If the protest for non-acceptance or non-payment is not registered within the time and in the manner prescribed by the statutes, there can be no recourse either against the drawer, indorsers, or acceptor, except by means of an ordinary action.

### SUBSECTION (2).—*When Competent.*

**570.** No document which requires proof, and especially parole proof to support it, can be used to found summary diligence. So in the case of a bill subscribed by initials,<sup>2</sup> or by a mark.<sup>3</sup> It seems doubtful whether the subscription of one notary and two witnesses is sufficient. A signature *per* procuration seems sufficient.<sup>4</sup> When a bill is vitiated *ex facie*, or the suspender's signature is proved *instantly* to be forged, summary diligence is incompetent. Where a bill is accepted conditionally, the acceptance becomes absolute only when the condition is fulfilled, and its fulfilment must be proved. Such acceptance, therefore, cannot be made effectual by summary diligence.

<sup>1</sup> Byles on Bills, 18th ed., 324.

<sup>2</sup> *Monro v. Munro*, 14th Nov. 1820, Hume, 81.

<sup>3</sup> *Stewart v. Russell*, 11th July 1815, F.C.; *Cockburn v. Gibson*, 8th Dec. 1815, F.C.

<sup>4</sup> *Summers v. Marianski*, 1843, 6 D. 286; *Turnbull v. M'Kie*, 1822, 1 S. 393.



SUBSECTION (3).—*To Whom Competent.*

**571.** By the terms of the Act of 1681 diligence may proceed at the instance of the person to whom or to whose order the bill is made payable. This includes the holder of a bill payable to the bearer, or blank indorsed, the payee named in the bill or a special indorsee, an assignee to whom the bill has been assigned by the party who is in right of it, accompanied by the document, or one to whom the right to the bill has passed by the operation of law. Where a firm with a descriptive name is the holder, the protest should run in the name of the firm, with the addition of the names of at least three partners if there are so many.<sup>1</sup> As a general rule, the raiser of diligence on a bill must have it in his possession, and be ready to deliver it up discharged on receiving payment.

**572.** In order to entitle a party to proceed by summary diligence, his title to the bill must appear completely *ex facie* of the instrument. If extrinsic evidence be required to prove that the holder is the indorsee, there can be no summary diligence.<sup>2</sup> As, however, the Act provides (s. 7 (2)) that a bill may be made payable to the holder of an office for the time being, it may be a question now whether diligence cannot proceed in the name of the person holding the office—*e.g.* the agent of a certain bank, although evidence will be required to show who that agent is. The mere assignation of a bill which has been protested in name of the cedent does not apparently authorise summary diligence in name of the assignee. But if the assignation included the protest, it would probably give the assignee the cedent's right to follow it out by ulterior measures. The protest when registered in name of any of the parties described by the statutes is assignable to any person, to the effect of authorising diligence in the assignee's name. An executor also gets right by confirmation to a protest registered or diligence raised in his author's name.<sup>3</sup>

SUBSECTION (4).—*Procedure.*

**573.** To obtain summary execution, the extended instrument of protest must be registered in the books of the Court of Session, or of any Court competent to try an action for payment of the bill. It is sufficient if the protest be recorded in the books of a Court having jurisdiction over the particular party against whom diligence is being used, though that Court may have no jurisdiction over the other parties to the bill.<sup>4</sup> It is not necessary that the bill should be drawn, accepted, or made payable in Scotland.<sup>5</sup> The registration as a ground of diligence for non-acceptance must take place within six months after the date of the bill, or for non-payment within the same time after it falls due. In the case of bills payable on demand, the six months are reckoned from

<sup>1</sup> *Antermomy Co. v. Wingate*, 1866, 4 M. 1017.

<sup>2</sup> *Fraser v. Bannerman*, 1853, 15 D. 756.

<sup>4</sup> *Mackenzie v. Hall*, 1854, 17 D. 164.

<sup>3</sup> *Thompson on Bills*, 2nd ed., 418.

<sup>5</sup> *Sutherland v. Gunn*, 1854, 16 D. 339.

the date of demand and not from the date of the bill. It is competent at the instance of a foreigner to protest a bill of exchange, to register the protest, and charge the debtor on the extract, without a mandatary having been sisted, but if a litigation ensues a mandatary must be sisted.<sup>1</sup>

**574.** The registration of the instrument of protest has the effect of a decree by a competent Court for payment of the bill, and the extract contains a warrant for all lawful execution thereon.<sup>2</sup> The charge is executed on *induciae* of six days. A warrant against a firm may be executed against any of the partners.

**575.** Up to the execution of a charge, the debtor may be entirely ignorant of the proceedings that are being taken against him, and even if he knows of them, he can do nothing to prevent them. If he has any defence, the time for stating it comes after the execution of the charge, when he can present a note in the Bill Chamber craving that the charge be suspended. If the reasons stated by him are relevant, the note will be passed, on caution or without according to circumstances, and the case will be disposed of in the Court of Session in the usual way, the charge being in the meantime suspended.

#### SUBSECTION (5).—*Action on the Bill.*

**576.** At common law, the person in right of a bill has a claim first against the acceptor, and failing payment by him then against all or any one of the previous parties, for the full amount of the bill, always assuming that he has taken the necessary steps of presenting, giving notice, and in some cases protesting, required by the Act. This action may be raised at any time during the six years of prescription, and he can take execution against all the parties till he recovers full payment. In an action laid on a bill, the bill should be set forth in the conclusions of the summons; but if this is omitted the summons may be amended.<sup>3</sup>

### SECTION 23.—SIGNATURE AS AGENT OR IN REPRESENTATIVE CAPACITY.

#### SUBSECTION (1).—*General Rule as to Liability.*

**577.** Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability (s. 26 (1)). An agent signing a bill will be personally liable upon it unless he states upon the face of the bill that he subscribes it for another—unless he says plainly, “I am the mere scribe.”<sup>4</sup> In determining whether a signature on a bill is that of the

<sup>1</sup> *Ross v. Shaw*, 1849, 11 D. 984.

<sup>2</sup> Writs of Execution Act, 1877.

<sup>3</sup> *Bank of Scotland v. Fergusson*, 1898, 1 F. 96.

<sup>4</sup> *Leadbitter v. Farrow*, 1816, 5 M. & S., per Lord Ellenborough at p. 349.

principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted (s. 26 (2)).

SUBSECTION (2).—*Bill drawn upon Principal and accepted by Agent.*

**578.** If a bill is drawn upon a principal, it may be accepted by a duly authorised agent, either in the name of the principal (s. 91 (1)) or in the name of the agent. In either case the signature is construed to be the signature of the principal. If it were not so, the acceptance would be invalid, as no one can accept a bill except the drawee (s. 17). We are entitled so to construe it, if the agent was authorised to accept bills drawn upon the principal.<sup>1</sup>

SUBSECTION (3).—*Bill drawn upon Agent and accepted by him in Principal's Name.*

**579.** Where a bill is drawn on an agent, and the agent, with the authority of the principal, accepts it in the name of the principal, or on behalf of the principal, the principal is not liable on the bill. The common law rule as to the liability of a principal on contracts made by his agent on his behalf does not apply to bills, and the principal in the case figured cannot be held liable directly as acceptor, because the bill is not drawn upon him. But the principal, of course, may be liable on the contract in connection with which the bill was drawn.<sup>2</sup>

SUBSECTION (4).—*Bill drawn by an Agent in his own Name.*

**580.** For the same reason, if a duly authorised agent draws or indorses a bill in his own name, the principal is not liable on the bill. The principal's signature is not on the bill, and there is no need to hold that it is there by construction, for the bill is valid as it stands.

SUBSECTION (5).—*Bill drawn by an Agent in Principal's Name.*

**581.** If, however, the agent signs the principal's name, being authorised to do so, or signs his own name expressly on behalf of the principal, then the principal will be liable as drawer or indorser as the case may be.<sup>3</sup>

SUBSECTION (6).—*Bill drawn upon Agent and accepted by him in his own Name.*

**582.** If a bill is drawn on an agent in his own name, and he accepts it, he is liable upon it, and that even if he adds words to his signature

<sup>1</sup> *Lindus v. Bradwell*, 1848, 17 L.J.C.P. 121; 5 C.B. 583; *Jenkins v. Morris*, 1847, 16 M. & W. 877; *Okell v. Charles*, 1876, 34 L.J.N.S. 822, C.A.

<sup>2</sup> *Polhill v. Walter*, 1832, 3 B. & Ad. 114. <sup>3</sup> *Ducarrey v. Gill*, 1830, Moo. & M. 450.



indicating that he signs only on behalf of his principal. He is held, nevertheless, to contract personally. The bill is drawn upon him and he has accepted it. The reverse is the case, as already stated, where the bill is drawn on the principal. In that case the agent is not personally liable, even if he accepts in his own name without qualification. The contract is in terms with the principal, and the agent is not liable.

**583.** If an agent signs a bill as drawer or indorser in his own name he is personally liable, unless he qualifies the signature by adding words thereto indicating that he signs for and on behalf of a principal or as an agent. But the mere addition to the signature of words describing him as an agent does not exempt him from personal liability. The addition is held to be merely descriptive of the signer, and not to limit his liability.

#### SECTION 24.—INCHOATE INSTRUMENTS.

**584.** Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser, and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact. Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time, and strictly in accordance with the authority given (s. 20).

**585.** The mandate to convert the paper into a bill will expire with the death of the mandant, and if the conversion does not take place till afterwards it will be ineffectual as between the immediate parties, unless the authority is coupled with an interest, as in the case where the bill is granted for an onerous consideration.<sup>1</sup> If the paper be given for the accommodation of the party who receives it, the latter cannot complete it after the granter's death.<sup>2</sup> So the authority cannot be exercised after the sequestration of the granter.<sup>3</sup>

**586.** It has been held in England that where a party put a blank acceptance of his own in his desk and it was stolen, and then filled up as a bill, even a holder in due course could not recover from the party because he had never delivered the inchoate instrument.<sup>4</sup> Again, it

<sup>1</sup> *Carter v. White*, 1883, L.R. 25 Ch.D. 666.

<sup>2</sup> *Hutch v. Searles*, 1884, 24 L.J.Ch. 22; *France v. Clark*, 1884, L.R. 26 Ch.D. at p. 262.

<sup>3</sup> *M'Meehin v. Russell*, 1881, 8 R. 587.

<sup>4</sup> *Baxendale v. Bennett*, 1878, L.R. 3 Q.B.D. 525.



has also been held in England that if a party hands notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, and the agent, contrary to the instructions of his principal, fills in the blanks in the notes and negotiates them to a holder in due course, the party is not liable upon them. In order to be effectual, the blank stamped paper must be delivered by the signer in order that it may be converted into a bill, and the defence that it was not so delivered may be proved by parole evidence even as against a holder in due course.<sup>1</sup>

**587.** The signer of the paper may be barred, however, from taking this plea, if he has been guilty of negligence in the matter. This is a question of fact in all cases. In one case the acceptor of a bill of exchange, with the intention of cancelling it, tore it into two pieces and threw them into the street. They were picked up by the indorser, joined together, and the bill was put into circulation. The acceptor was held liable, because, said the Court, although he did intend to cancel it yet he did not cancel it. The appearance of the bill after the pieces were joined together was consistent with the bill having been divided merely for safe transmission.<sup>2</sup> Similar considerations will apply to the matter under consideration. To amount to negligence, however, there must always be the neglect of some duty owing to some person.<sup>3</sup> The neglect must be in the transaction itself, and be the proximate cause of leading the party into that mistake, and also must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public, of whom that person is one, and not merely neglect of what would be prudent in respect to the party himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not party.

**588.** If a bill is delivered in an incomplete state and is filled up for an amount greater than was authorised by the signer, the signer will not be liable to the person to whom he delivered the bill, or to a subsequent holder who has knowledge of the facts, and the signer can prove the facts by parole evidence.<sup>4</sup> He will, however, be liable to a holder in due course. Even if there be a marginal note on the incomplete bill, stating a sum of money, and this note has been altered to a larger sum, a holder in due course may disregard such alteration, and claim the sum contained in the completed bill. He may assume that the alteration was made with the authority of the signer.<sup>5</sup>

**589.** In the absence of agreement to the contrary, the person to whom the inchoate instrument is delivered may fill it up in any way he pleases, using the names of other parties and not his own.<sup>6</sup>

<sup>1</sup> *Smith v. Prosser*, [1907] 2 K.B. at p. 753.

<sup>2</sup> *Ingham v. Primrose*, 1851, 7 C.B. (N.S.) 82.

<sup>3</sup> *Swan v. North British Australasian Co.*, 1863, 2 H. & C. 175.

<sup>4</sup> *Anderson v. Lorimer*, 1857, 20 D. 74; *Anderson v. Somerville Murray & Co.*, 1898, 1 F. 90; *Hogarth v. Latham & Co.*, 1878, L.R. 3 Q.B.D. 643.

<sup>5</sup> *Garrard v. Lewis*, 1882, L.R. 10 Q.B.D. 30.

<sup>6</sup> *Russell v. Banknock Coal Co.*, 1897, 24 R. 1009.

## SECTION 25.—BILLS IN A SET.

**590.** Where a bill is drawn in a set, each part of the set being numbered and containing a reference to the other parts, the whole of the parts constitute one bill (s. 71 (1)). Only one part of a set requires to be stamped. The remaining parts are exempt, unless issued or in some manner negotiated apart from the stamped part. Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills (s. 71 (2)). Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is, as between such holders, deemed the true owner of the bill ; but nothing in this subsection shall affect the rights of a person who in due course accepts or pays the part first presented to him (s. 71 (3)).

**591.** The acceptance may be written on any part, and it must be written on one part only. If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course, he is liable on every such part as if it were a separate bill (s. 71 (4)). When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof (s. 71 (5)). Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged (s. 71 (6)).

## SECTION 26.—LOST INSTRUMENTS.

**592.** Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer, if required, to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again. If the drawer on request, as aforesaid, refuses to give such duplicate bill, he may be compelled to do so (s. 69). The new bill will require a fresh stamp. In any action or proceeding upon a bill, the Court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the Court or judge against the claims of any other person upon the instrument in question (s. 70).

**593.** In a question with the finder of the bill, the person in right of it has a good action for the recovery of the instrument, but if it is in the possession of a holder in due course from such finder, no right of action for recovery against the holder exists. The person in right of the bill can only recover from the finder whatever value he has received for it. Where a bill has been lost and the holder chooses to sue for the value he gave for it, and not to found his action on the bill, he is nevertheless

bound to give security to the satisfaction of the Court against other demands on the instrument.<sup>1</sup>

**594.** The fact that a bill has been lost or destroyed does not excuse the omission to give notice of dishonour, or of protesting, when necessary. Presentment for payment may be excused (s. 46 (1)), or dispensed with in certain cases (s. 46 (2)).<sup>2</sup>

**595.** In addition to the remedies given by the Act, the holder of a bill which has been lost or destroyed may in Scotland prove its tenor in the usual way. The presumption of law is that a lost or destroyed bill or note was duly stamped unless the contrary be shewn.<sup>3</sup>

#### SECTION 27.—CONFLICT OF LAWS.

##### SUBSECTION (1).—*Validity of Bill as regards Form.*

**596.** Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows :—

The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance supra protest, is determined by the law of the place where such contract was made. Provided that—(a) where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue; (b) where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom (s. 72 (1)).

##### SUBSECTION (2).—*Interpretation.*

**597.** Subject to the provisions of the Act, the interpretation of the drawing, indorsement, acceptance, or acceptance supra protest of a bill is determined by the law of the place where such contract is made. Provided that where an inland bill is indorsed in a foreign country the indorsement shall as regards the payer be interpreted according to the law of the United Kingdom (s. 72 (2)).

##### SUBSECTION (3).—*Duties of Holder.*

**598.** The duties of the holder, with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured (s. 72 (3)).

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<sup>1</sup> *Maberley v. Bank of Scotland*, 1825, 1 W. & S. 10.

<sup>2</sup> Thomson on Bills, 2nd ed., 204.

<sup>3</sup> *Marine Investment Co. v. Haviside*, 1872, L.R. 5 H.L. 625.



SUBSECTION (4).—*Amount of Bill.*

**599.** Where a bill is drawn out of but payable in the United Kingdom, and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable (s. 72 (4)).

SUBSECTION (5).—*Due Date.*

**600.** Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable (s. 72 (5)).

## SECTION 28.—ACCOMMODATION BILLS.

SUBSECTION (1).—*Nature of Accommodation Bill.*

**601.** Professor Bell thus describes the nature of accommodation bills.<sup>1</sup> “ Besides the proper mercantile use of bills and notes in transmitting money from one country to another, and in bringing into a discountable form the prices of goods sold on credit, so that the debt may be used as money, there is another purpose to which this form of obligation has been applied, namely to supply traders on occasion of sudden difficulties, or as the means of speculation, with money and commodities by the loan of credit. Bills and notes so used have been called accommodation or wind bills. In this species of transaction, the person requiring the accommodation prevails with his friend to accept a note or bill for the sum to be raised, at such a date as a banker will discount, it being understood that he for whose use the bill is intended is to provide the means of paying it, or is himself to retire it. The bill is discounted and produces money, and if he who receives the money provides for the due payment of the bill, the transaction is closed. This is done sometimes as a single transaction on the footing of mere friendship, it is sometimes done in consideration of a commission, and not unfrequently credit is thus supplied by means of a course of bills drawn and redrawn, the expense of which in interest and commission is enormous.

“ But persons under the necessity of adopting this expedient generally agree with some house which requires the same sort of accommodation, that they shall mutually draw on each other, or exchange acceptances, or even exchange the more dangerous instruments called skeleton bills. Sometimes it is necessary to have two or three houses engaged in the traffic, and the creation of fictitious firms, the use of feigned names, the careful avoidance of the same train of discounts, are the dangerous and discreditable expedients into which this ruinous practice leads the parties. It is a subject of sincere regret with everyone

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<sup>1</sup> Comm. i. 449.



who considers this subject that parties have ever been permitted to depart in these accommodation transactions from the character which they bear on the face of the bill, or to pretend to rights not strictly belonging to the place which on the document they profess to hold.”

SUBSECTION (2).—*Proof of Non-onerosity.*

**602.** Prior to the Act of 1882 the fact that the person who stood *ex facie* of the bill true debtor was not so in fact could be proved by writ or oath of the party claiming, but not otherwise. So if a party accepted a bill drawn upon him by another, for the accommodation of the latter, he was liable upon the bill to the drawer, unless he could prove by the writ or oath of the drawer the true state of the facts. This is altered by the Act, and the fact may now be proved by parole evidence.<sup>1</sup>

SUBSECTION (3).—*Definition.*

**603.** Various definitions have been given of an accommodation bill. Thus it has been defined as a bill to which the accommodating party, be he acceptor, drawer, or indorser, has put his name, without consideration, for the purpose of benefiting or accommodating some other party who desires to raise money on it and is to provide for the bill when due.<sup>2</sup> Another narrower definition has been given, to the effect that an accommodation bill is a bill whereof the acceptor (*i.e.* the principal debtor according to the terms of the instrument) is in substance a mere surety for some other person, who may or may not be a party thereto.<sup>3</sup>

**604.** The Act does not define an accommodation bill but does define an accommodation party thus : An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. An accommodation party is liable on the bill to a holder for value ; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not (s. 28).

SUBSECTION (4).—*Effect of Accommodation Bills.*

**605.** These bills, so far as no money or other consideration passes, are accommodation bills ; they become bills in real transactions from the moment that money is advanced upon them. As a bill is a mandate to pay money for the drawer, the effect of acceptance where there are no funds is, on payment by the acceptor, to raise a debt against the drawer. And so in regard to indorsement ; each indorsement, where no money is given for it, is the creation of a debt against him for whose use it is intended, on the indorser paying the bill.

**606.** The person for whose use a bill of this kind is made is the primary debtor, the others are cautioners. Where they engage by concert,

<sup>1</sup> Para. 616, *infra*.

<sup>2</sup> Byles, 18th ed., 155.

<sup>3</sup> Chalmers, 8th ed., 102.

or in the knowledge of each other's accommodation to the same person, they are co-cautioners, in so far as concerns their reciprocal responsibility *inter se*. To the bill-holder, who is not one of the accommodators, they are all responsible jointly and severally, as if the bill had originated in a real transaction,<sup>1</sup> and this is so even where the bill-holder knows the bill to be an accommodation one.

SUBSECTION (5).—*Duties of the Holder.*

**607.** An onerous *bona fide* holder of an accommodation bill is not bound to the same strictness of presentment for payment as the holders of other bills are. Such presentment is dispensed with in a question with the drawer, where the drawee or acceptor is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented. In a question with an indorser, such a presentment is dispensed with where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented (s. 46 (2) *c, d*).

**608.** Notice of dishonour is dispensed with in a question with the drawer, where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill. In a question with an indorser, such notice is dispensed with where the bill was accepted or made for his accommodation (s. 50 (2) *c, d*). Protest is dispensed with by any circumstance which would dispense with notice of dishonour (s. 51 (9)).

**609.** As already said, he for whose use an accommodation bill is made is the primary debtor, the others are cautioners. All the equities of cautionary obligations, therefore, apply to the case, if or so soon as the holder of the bill is aware of the nature of the bill. Thus, if the holder gives time to the accommodated party, all the other parties to the bill are discharged. So if he discharges the accommodated party, unless he reserves his rights against the others, they are discharged; if he discharges one of the cautioners, all other parties who had a right of recourse against that party are discharged; if he gives up securities which he held of the accommodated party, all the other parties are *pro tanto* discharged.

SUBSECTION (6).—*Proof of the Rights and Obligations of the Parties inter se.*

**610.** Parole proof is competent to show what are the rights and obligations of the parties to a bill *inter se*. So where the directors of a company mutually agreed with each other to become sureties to the bank for the same debts of the company, and in pursuance of that

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<sup>1</sup> Bell, Com. i. 450.

agreement successively indorsed three promissory notes of the company, it was held that they were entitled and liable to equal contributions *inter se*, and were not liable to indemnify each other successively according to the priority of their indorsements.<sup>1</sup>

SUBSECTION (7).—*Discharge.*

**611.** An accommodation bill is discharged when paid in due course by the party accommodated (s. 59 (3)). The bill is paid by the person ultimately liable, and is no longer a negotiable instrument.

SECTION 29.—THE RANKING OF CROSS ACCOMMODATION BILLS.

**612.** As has been said, two parties frequently draw bills mutually on each other and exchange their acceptances in order that these may be discounted by the banks. Questions may thus arise as to the liabilities of the parties on such transactions, and these will vary according to the facts in each case. So long as the acceptances remain in the hands of the parties themselves, it is obvious that neither can claim against the other, because the bills are accommodation bills only. And this is so whether the parties remain solvent or not. If both parties become bankrupt, there is an extinction of the cross paper *hinc inde*, and there can be no ranking in respect of it.<sup>2</sup>

**613.** If the accommodation paper has been discounted on both sides, and both parties have become bankrupt, the holders of the bills, who are generally the discounting banks, are entitled to rank on both estates in respect of them to the full extent, and there can be no separate claim by either estate on the other on account of any excess it may have been called on to pay.<sup>3</sup> If the accommodation paper has been discounted on one side only, and both parties are bankrupt, the holder of the discounted bill may rank on both estates to the extent of drawing full payment, and there can be no further ranking because such ranking would be double ranking.

**614.** Where one of the parties to mutual accommodation bills which have been discounted on both sides is solvent and takes up the bills, he can be ranked on the bankrupt estate of the other party only in respect of the bill on which the bankrupt was acceptor.<sup>4</sup> Having retired these bills, he will rank on the bankrupt estate for the amount. But he cannot be ranked in respect of the bill on which he was himself acceptor. That was his proper debt, and having been retired by him the bill is extinguished.

<sup>1</sup> *Macdonald v. Whitfield*, 1883, L.R. 8 App. Cas. 733.

<sup>2</sup> Bell, Com. ii. 423.

<sup>3</sup> Goudy on Bankruptcy, 3rd ed., 629; *Anderson v. Mackinnon*, 1876, 3 R. 608; *Mackinnon v. Monkhouse*, 1881, 9 R. 393.

<sup>4</sup> Bell, Com. ii. 423; *Newbigging v. Heywood, Collins & Co.'s Trs.*, 1823, 2 S. 481; *Gibb v. Brock*, 1838, 16 S. 1002.



## SECTION 30.—PAROLE EVIDENCE IN CONNECTION WITH QUESTIONS ARISING ON BILLS.

**615.** Parole evidence has always been competent in Scotland to shew *quo animo* a bill has been delivered, in questions between immediate parties, and as regards a remote party other than a holder in due course ; that is to say, to shew whether the delivery has been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill. It has also been held competent to shew the true relation and liability *inter se* of the parties to a bill, *e.g.* to shew that one of them, whatever may be the position of his signature on the bill, is truly the principal obligant, and that the others are merely cautioners. Further, parole evidence has been held competent to prove defects of title of a person who has negotiated a bill, as a defence in a claim by a holder other than a holder in due course.

**616.** It appears to have been the purpose of the Act to extend the competency of parole evidence to other cases. It provides that in any judicial proceeding in Scotland any fact relating to a bill of exchange, bank cheque, or promissory note, which is relevant to any question of liability thereon, may be proved by parole evidence (s. 100). Under this provision, it has been held competent to prove by parole evidence, in cases of accommodation bills, that the person who stood *ex facie* of the bill true debtor was not so in fact. This, before the passing of the Act, could only be proved by the writ or oath of party.<sup>1</sup> What further effect the provision has, if any, is unfortunately, on the subsequent decisions of the Scottish Court, very obscure.

**617.** The first case was that which has just been cited. The facts were, that the drawees of a bill for value refused to accept it, and the holder brought an action on the bill against the drawers. The drawers averred a verbal agreement between them and the holders, that in the case of bills like that in question the holders were to rely solely upon the drawees, and that the drawers were in no case to be liable. It was held that the defence could not be admitted to probation, the Lord President and Lord M'Laren holding that, notwithstanding the terms of the hundredth section of the Act, it was incompetent for the defenders to contradict by parole their liability as it appeared on the face of the bill ; and Lord Adam and Lord Kinnear holding that the averment was irrelevant, inasmuch as the agreement founded on therein must be construed as an agreement to come into operation only in the event of bills being accepted by the drawees, which was not averred. The opinion was expressed, however, by Lord Adam that under the hundredth section of the Act it was competent for the drawers of a bill, in a question with a holder for value, to prove a parole agreement contradicting his liability on the face of the bill.

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<sup>1</sup> *National Bank of Australasia v. Turnbull & Co.*, 1891, 18 R. 629.



**618.** The next case which occurred was that of *Gibson's Trs. v. Galloway*.<sup>1</sup> That arose on a promissory note where the maker averred that, under an arrangement between him and the creditor, the promissory note was to be renewed when due, and from time to time thereafter, until he should be in a position to repay it without detriment to his business engagements, and that he had been assured by the creditor that the date of repayment would be left to himself so long as interest was paid. The Court (reversing the judgment of Lord Kincairney) held that the defender was not entitled to a proof of his averment, on the ground that if the agreement meant that the defender was not bound to pay the principal sum but an annuity, it contradicted the written obligation; and that if the agreement meant a promise by the creditor not to press for payment, the agreement not being in writing, it was not binding on his executors. In the case of *Robertson v. Thomson*,<sup>2</sup> the acceptor of a bill averred that he had paid it. The Court held that parole proof of payment was incompetent, Lord Adam saying that in his opinion it was not the intention of s. 100 of the Act to alter the rules of the law of Scotland as to the modes in which payment of a debt constituted in writing may be proved. The next case was *Drybrough & Co., Ltd. v. Roy*,<sup>3</sup> which was an action by the drawers of a bill against the acceptor, who contended that he was not liable, on the ground that there was a verbal agreement which was to endure for the currency of his lease, so long as his business continued to be profitable, under which agreement the drawers undertook to renew the bill, provided that the acceptor purchased from the drawers all beer to be retailed by him, and that he regularly paid interest upon the loan. The Court held that the acceptor was entitled to prove these averments by parole evidence. It was observed by Lord Trayner, that where the question is one of liability on a bill of exchange, bank cheque, or promissory note, the Bill of Exchange Act has introduced an exception to the general rule that parole evidence is inadmissible to enable an obligant to contradict or modify his written obligation.

**619.** In *Viani & Co. v. Gunn & Co.*<sup>4</sup> the indorsee and holder of a bill claimed against the acceptor, who averred that the bill was for the accommodation of the indorsee, and that the indorsee had agreed that in the event of the bill being in his hands at maturity he would not call upon the acceptor to retire it. It was held (*diss.* Lord Young) that, under s. 100 of the Bills of Exchange Act, the defender was entitled to a proof before answer of his averments. In the case of *The Manchester and Liverpool District Banking Co. v. Ferguson & Co.*<sup>5</sup> the indorsee claimed against an acceptor, who averred a verbal agreement of so vague a nature that it would not have been remitted to probation by writ or oath under the old law. Probation was therefore refused.

**620.** Lastly, in *Stagg & Robson, Ltd. v. Stirling*,<sup>6</sup> bills had been granted in terms of a written agreement. A subsequent verbal agree-

<sup>1</sup> 1896, 23 R. 414.<sup>2</sup> 1900, 3 F. 5.<sup>3</sup> 1903, 5 F. 665.<sup>4</sup> 1904, 6 F. 989.<sup>5</sup> 1905, 7 F. 865.<sup>6</sup> 1908, 45 S.L.R. 488.

ment was averred which in effect contradicted the written agreement, and parole evidence was refused on common law grounds, and it was unnecessary to consider the provision of the Act. Lord Dunedin, however, said: "The meaning of the provision (in the hundredth section of the Act), I think, was clear enough—to allow you to prove by parole what the rules of law might not allow to be proved by parole, namely the true relations to each other of the parties upon the bill; that is to say, that the indebtedness which *prima facie* on the bill is upon the acceptor, might be shewn to be not really upon the acceptor, or, in other words, that the true position of the names on the bills might be proved. But I do not think that that section has anything to do with the general rule of law, which is, that you cannot alter a written agreement by parole evidence." Lord Kinnear said: "The old rule of our law, which has been displaced by the hundredth section of the Bills of Exchange Act, created a presumption of onerosity so strong, that although it might be contradicted, it was not allowed to be disproved, except by the writ of the party seeking to enforce liability on the bill, or else by a reference to his deposition on oath. . . . Now I apprehend that the main purpose of the section in question was to remedy that injustice, but I think that it is extremely probable that the language of the clause went somewhat beyond what was required to remedy the particular mischief to which I have referred, and it may be that it would allow of parole evidence being admitted with reference to other questions of liability than those which depend on mere presumption of onerosity. However that may be, I am certainly of opinion that it can only apply to cases where the alleged liability is rested exclusively upon a bill, and not upon a bill as the mere method of carrying into effect a written contract."

**621.** It will thus be seen that the opinions of the judges in Scotland as to the true effect of this provision of the Act are not at one, and it is therefore impossible to state what the true effect is.

**622.** Whatever the scope and effect of the hundredth section may be, it does not affect the procedure in suspensions of a charge upon a bill. It provides that this enactment shall not in any way affect the existing law and practice whereby the party who is, according to the tenor of any bill of exchange, bank cheque, or promissory note, debtor to the holder in the amount thereof, may be required, as a condition of obtaining a sist of diligence, or suspension of a charge, or threatened charge, to make such consignment, or to find such caution as the Court or judge before whom the cause is depending may require. This section does not apply to any case where the bill of exchange, bank cheque, or promissory note has undergone the sexennial prescription.

### SECTION 31.—CHEQUES.

#### SUBSECTION (1).—*Definition.*

**623.** A cheque is a bill of exchange drawn on a banker, payable on demand. Except as otherwise provided, the provisions of the Act

applicable to a bill of exchange payable on demand apply to a cheque (s. 73).

SUBSECTION (2).—*Differences between Cheques and Bills.*

**624.** In many respects a cheque resembles a bill of exchange, but in some respects it is entirely different. Thus a cheque does not require acceptance, and in ordinary course it is never accepted. It is not intended for circulation, it is given for immediate payment. It is not entitled to days of grace. And although it is, strictly speaking, an order upon a debtor by a creditor to pay to a third person the whole or part of a debt, yet in the ordinary understanding of persons it is not so considered. It is more like an appropriation of what is treated as ready money in the hands of the banker, and in giving the order to appropriate to a creditor, the person giving the cheque must be considered as the person primarily liable to pay, who orders his debt to be paid at a particular place, and as being in the same position as the maker of a promissory note, or the acceptor of a bill of exchange, payable at a particular place and not elsewhere, who has no right to insist on immediate presentment at that place.<sup>1</sup> A cheque on a banker payable to bearer is a negotiable instrument, and passes by indorsement, so as to entitle a holder, if the cheque be dishonoured, to sue the drawer and indorser thereon, as in the case of a bill of exchange.<sup>2</sup>

SUBSECTION (3).—*Notice of Dishonour.*

**625.** If a cheque is dishonoured, notice must be given by the holder to an indorser in order to preserve recourse against him, as in the case of a bill of exchange. Notice, however, does not require to be made to the drawer if he has countermanded payment of the cheque, or if the reason of the dishonour is that the bank has no funds of the drawer in its hands. Notice is dispensed with in such cases, because the drawer is already aware that the bank is under no obligation to cash the cheque.<sup>3</sup>

SUBSECTION (4).—*Duty of Banker and of Customer.*

**626.** A banker having in his hands effects of his customer is bound, within a reasonable time after he has received the money, to pay his customer's cheques, and is liable in damages to the customer if he do not. There is an implied contract between the banker and his customer that the banker shall pay the customer's cheques, and the customer's credit may be seriously impaired by a refusal. On the other hand, a customer of a bank owes a duty to the bank, in drawing a cheque, to take reasonable and ordinary precautions against forgery, and if, as the natural and

<sup>1</sup> *Ramchurn Mullick v. Luchmeechund Radakissen*, 1854, 9 Moore P.C., per Parke B. at p. 69; *Serle v. Norton*, 1841, 2 Moo. & Rob. at p. 404.

<sup>2</sup> *Keane v. Beard*, 1860, 8 C.B. (N.S.) 380; *Hopkinson v. Forster*, 1874, L.R. 19 Eq. 76.

<sup>3</sup> Para. 553, *supra*.



direct result of the neglect of those precautions, the amount of the cheque is increased by forgery, the customer must bear the loss as between himself and the banker. So if the cheque be drawn with spaces left in it, so that the amount may be altered in a way which cannot be detected, and the bank pays the amount as altered, it can debit the drawer's account with such amount.<sup>1</sup>

**627.** The presentment of a cheque at the bank operates as an intimated assignation of the drawer's funds in the hands of the bank, and that although the drawer has countermanded payment, or the bank refuses to cash the cheque on the ground that the funds of the drawer in its hand are insufficient to cover the amount.<sup>2</sup>

**628.** The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by: (1) Countermand of payment; (2) notice of the customer's death (s. 75). If the drawer of a cheque countermands payment after it has been indorsed away for value, the holder can sue the drawer for the amount. The cheque is a negotiable instrument, and if it be dishonoured for any reason, the holder can claim against the drawer.<sup>3</sup> The banker must have actual notice, or have otherwise knowledge, of the death of the customer. Until then he is entitled and bound to honour his customer's cheques.

#### SUBSECTION (5).—*Presentment for Payment.*

**629.** Although a holder of a cheque delays to present it, the drawer continues to be liable upon it until the cheque prescribes under the sexennial prescription, so long as he suffers no damage through the delay in presentment. The practice of banks, however, in cases where the delay exceeds a certain period, say six months, is to refer to the drawer before cashing the cheque. If, however, the drawer suffers damage by the delay, the case is different. Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment, as between him and the banker, to have the cheque paid, and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him (s. 74).

<sup>1</sup> *Young v. Grote*, 1827, 4 Bing. 253; *London Joint Stock Bank v. Macmillan*, [1918] A.C. 777.

<sup>2</sup> *British Linen Co. Bank v. Carruthers and Fergusson*, 1883, 10 R. 923.

<sup>3</sup> *M'Lean v. Clydesdale Bank*, 1883, 11 R. (H.L.) 1.



**630.** In England it has been held that the payee has till the end of banking hours on the day next after receiving the cheque to present it. If the place of payment be at a distance, the payee must send it off to his correspondent by the post of the day he received it or that of the following morning, and his correspondent appears to have till the close of banking hours on the day after receiving it to present. If the cheque be crossed, a payee, if he has time, must pay it into his own bankers on the day of getting it.<sup>1</sup> As between the payee of a cheque and an indorsee to whom he has indorsed it, the indorsee must present the cheque within a reasonable time.<sup>2</sup>

#### SUBSECTION (6).—*Stale Cheque.*

**631.** A cheque is deemed to be stale or overdue when it appears on the face of it to have been in circulation for an unreasonable length of time. By unreasonable time is meant such a length of time as ought to have excited suspicion in the mind of an ordinarily careful holder.<sup>3</sup> A person who takes such a cheque by indorsement can acquire or give no better title than that which the person from whom he took it had.<sup>4</sup>

#### SUBSECTION (7).—*Dividend Warrant.*

**632.** A dividend warrant is practically an ordinary cheque and is negotiable. Where a dividend warrant is payable to the order of two or more persons, the custom is to pay on the indorsement of any one of them, differing thus from the rule as to bills of exchange. The validity of this usage is recognised by the Act (s. 97, (3), *d*). The provisions of the Act as to crossed cheques apply to a warrant for payment of dividend (s. 95).

### SECTION 32.—CROSSED CHEQUES.

#### SUBSECTION (1).—*Object of Crossing.*

**633.** The object of crossing a cheque is to ensure as far as possible that it shall be cashed only by the party intended by the drawer, or by someone deriving his title from him.

#### SUBSECTION (2).—*General and Special Crossings.*

**634.** Where a cheque bears across its face an addition of (*a*) the words “and company,” or any abbreviation thereof, between two parallel transverse lines, either with or without the words “not negotiable,” or (*b*) two parallel transverse lines simply, either with or without the words “not negotiable,” that addition constitutes a crossing, and the cheque is crossed generally. Where a cheque bears

<sup>1</sup> Thomson on Bills, 2nd ed., 119.

<sup>2</sup> Para. 522, *supra*.

<sup>3</sup> *London and County Bank v. Groome*, 1881, L.R. 8 Q.B.D. 288.

<sup>4</sup> *Serrell v. Derbyshire Rly. Co.*, 1850, 9 C.B. 811.

across its face an addition of the name of a banker, either with or without the words "not negotiable," that addition constitutes a crossing, and the cheque is crossed specially and to that banker (s. 76).

**635.** A cheque may be crossed generally or specially by the drawer. Where a cheque is uncrossed, the holder may cross it generally or specially. Where a cheque is crossed generally, the holder may cross it specially. Where a cheque is crossed generally or specially, the holder may add the words "not negotiable." Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection (s. 77). Where an uncrossed cheque or a cheque crossed generally is sent to a banker for collection, he may cross it specially to himself.

**SUBSECTION (3).—*Crossing does not affect Negotiability.***

**636.** The crossing of a cheque in no way affects its negotiability, and this may have the effect of destroying the protection it is intended to provide. Suppose a cheque payable to bearer and crossed is stolen. The thief may not have a banker who will collect the money for him, but he may be able to transfer the cheque to a holder in due course who has a banker, and who gets the cheque paid on presentment through such banker. The banker who pays and the banker who receives the money are protected, and the only recourse the true owner of the cheque has is against the thief. To prevent this, the words "not negotiable" may be written on the bill, in addition to the crossing. The effect of this is that any person who takes such a cheque shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had (s. 81). No one, therefore, can become the holder in due course of such a cheque, and consequently if the person to whom the cheque has been transferred by the thief has received the money, he must refund it to the true owner of the cheque. This being so, it will be practically impossible for the thief to dispose of the cheque.

**637.** A crossing authorised by the Act is a material part of the cheque; it is not lawful for any person to obliterate or, except as authorised by the Act, to add to or alter the crossing (s. 78).

**SUBSECTION (4).—*Duties of Banker.***

**638.** Where a cheque is crossed specially to more than one banker, except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment thereof. Where the banker on whom a cheque is drawn which is so crossed nevertheless pays the same, or pays a cheque crossed generally otherwise than to a banker, or if crossed specially otherwise than to the banker to whom it is crossed or his agent for collection being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid. Provided that where a cheque is presented for payment

which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to or altered otherwise than as authorised by this Act, the banker paying the cheque in good faith and without negligence shall not be responsible or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorised by this Act, and of payment having been made otherwise than to a banker, or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker as the case may be (s. 79).

**639.** Where the banker on whom a crossed cheque is drawn, in good faith and without negligence, pays it, if crossed generally to a banker, and if crossed specially to the banker to whom it is crossed or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof (s. 80).

**640.** Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment (s. 82). In such a case the collecting banker can retain the money so collected and apply it to balance an account which has been overdrawn by his customer,<sup>1</sup> and the true owner of the cheque has recourse only against the customer.

**641.** The banker must not be guilty of negligence in collecting the cheque. The test is whether the transaction of paying in any given cheque, coupled with the circumstances antecedent and present, was so out of the ordinary course that it ought to have aroused doubts in the banker's mind and caused him to make inquiries. So if the manager of a business, who has authority to draw cheques *per pro* for the purposes of the business, fraudulently so draws a series of cheques and pays them into his own banking account. If his banker collects them without inquiry he is guilty of negligence and is not protected.<sup>2</sup> So where a banker receives for collection a cheque crossed "*a/c* payee," he will be guilty of negligence if he collects the cheque for a third party without any inquiry as to the latter's rights thereto.<sup>3</sup>

**642.** The banker must receive the proceeds of the cheque for a customer and for no other. A person becomes a customer of a bank as soon as the bank opens an account with him on which he can draw.<sup>4</sup> The collecting banker must do nothing further than receive payment for

<sup>1</sup> *Clarke v. London and County Banking Co.*, [1897] 1 Q.B. 552.

<sup>2</sup> *Morison v. London County and Westminster Bank*, [1914] 3 K.B. at p. 368.

<sup>3</sup> *House Property Co. v. London County and Westminster Bank*, 1915, 84 L.J.K.B. 1846; Byles on Bills, 18th ed., 36.

<sup>4</sup> *Ladbroke v. Todd*, 1914, 19 Com. Cas. at p. 261.



a customer. If he does more, *e.g.* if he cashes the cheque at once, he then collects the amount, not for the customer but for himself, and is not protected. It is now provided by the Bills of Exchange (Crossed Cheques) Act, 1906,<sup>1</sup> that a banker receives payment of a crossed cheque for a customer within the meaning of s. 82 of the Bills of Exchange Act, 1882, notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof. This Act was passed to alter the law which had been laid down previously.<sup>2</sup>

### SECTION 33.—PROMISSORY NOTES.

#### SUBSECTION (1).—*Definition.*

**643.** A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer. An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker. A note is not invalid by reason only that it contains also a pledge of collateral security, with authority to sell or dispose thereof. A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note (s. 83).

#### SUBSECTION (2).—*Form.*

**644.** No precise words of contract are essential in a promissory note, provided they amount in legal effect to an unconditional promise to pay, and provided also that there is evidence of the intention of the parties to make a promissory note. If there be no words amounting to a promise, the instrument is merely evidence of a debt and may be received as such between the original parties. Such is the common memorandum I O U.<sup>3</sup>

#### SUBSECTION (3).—*Liability of Maker.*

**645.** The maker of a promissory note by making it—(1) engages that he will pay it according to its tenor ; (2) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse (s. 88). A promissory note is inchoate and incomplete until delivery thereof to the payee or bearer (s. 84).

#### SUBSECTION (4).—*Application of Act.*

**646.** Subject to the provisions in Part IV. of the Act, and except as after provided, the provisions of the Act relating to bills of exchange apply with the necessary modifications to promissory notes. In applying those provisions, the maker of a note shall be deemed to

<sup>1</sup> 6 Edw. VII. c. 17.

<sup>2</sup> *Capital and Counties Bank v. Gordon*, [1903] A.C. 240.

<sup>3</sup> Byles on Bills, 18th ed., 4.



correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawer's order. The following provisions as to bills do not apply to notes ; namely, provisions relating to—(a) presentment for acceptance ; (b) acceptance ; (c) acceptance *supra* protest ; (d) bills in a set. Where a foreign note is dishonoured, protest thereof is unnecessary (s. 89). An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker (s. 83 (2)).

SUBSECTION (5).—*Joint and Several Notes.*

**647.** A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenor. Where a note runs : " I promise to pay " and is signed by two or more persons, it is deemed to be their joint and several note (s. 85). In Scotland a note signed by two or more makers imparts a joint and several obligation by each, although it contains no words to that effect (s. 97 (2)). If the word " jointly " is used, the obligation is *pro rata*.

SUBSECTION (6).—*Presentment for Payment.*

**648.** Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented, the indorser is discharged. In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case. Where a note payable on demand is negotiated, it is not deemed to be overdue for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue (s. 86). A promissory note thus differs from a bill of exchange or a cheque. These are intended to be presented and paid immediately ; a promissory note is often originally intended as a continuing security, and afterwards indorsed as such.<sup>1</sup>

**649.** Where a promissory note is, in the body of it, made payable at a particular place, it must be presented for payment at that place in order to make the maker liable. In any other case presentment for payment is not necessary in order to make the maker liable.

**650.** Presentment for payment is necessary in order to render the indorser of a note liable. Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable ; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice (s. 87).

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<sup>1</sup> Byles on Bills, 18th ed., 206.

## BILL OF HEALTH.

*See* IMPRISONMENT FOR DEBT; SHIP.

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## BILL OF LADING.

*See* CARRIAGE BY SEA; NEGOTIABLE INSTRUMENTS.

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## BILL OF SALE.

*See* SHIP.

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## BILL OF SUSPENSION.

*See* APPEAL (CRIMINAL).

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## BILL (PARLIAMENTARY).

*See* PARLIAMENT; PRIVATE BILL LEGISLATION.

## BILLETING.

*See* ARMED FORCES OF THE CROWN.

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## BILLIARD AND BAGATELLE ROOMS.

*See* LICENSING LAWS; THEATRES AND  
PLACES OF AMUSEMENT.

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## BIRDS, PROTECTION OF WILD.

*See* ANIMALS.

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## BIRTHS, EARLY NOTIFICATION OF.

*See* PUBLIC HEALTH.

## BIRTHS, REGISTRATION OF.

*See* REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

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## BISHOP'S TEINDS.

*See* TEINDS.

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## BLACK ACTS.

*See* STATUTE LAW.

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## BLACK LIST.

*See* DEFAMATION.



## BLACK MAIL.

*See* CASUALTIES OF SUPERIORITY; CRIME.

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## BLACK ROD, GENTLEMAN USHER OF THE.

*See* PARLIAMENT.

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## BLANK BILL.

*See* BILLS OF EXCHANGE.

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## BLANK DAYS.

*See* COURT OF SESSION.

# BLANKS IN DOCUMENTS.

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### SECTION 1.—INTRODUCTION.

**651.** There are various senses in which this may be understood, viz. (1) actual physical blanks; (2) legal blanks, *i.e.* where, though the blank has been filled up, that has been done at a time or under circumstances which the law will not recognise as complying with the rules for the valid completion of the document; and (3) the other kind of legal blank, where words written on erasure are held *pro non scriptis*.

### SECTION 2.—ACT 1696, c. 25.

**652.** The law on this subject is partly statutory, including the Scots Act, 1696, c. 25, which, so far as affecting this matter, runs thus:

No bonds, assignments, dispositions, or other deeds be subscribed blank in the person or person's name in whose favour they are conceived; and that the foresaid person or persons be either insert before or at the subscribing, or at least in presence of the same witnesses, who were witnesses to the subscribing, before the delivery. All writs otherwise subscribed and delivered blank shall be declared null. This Act shall not extend to the indorsation of bills of exchange or the notes of any trading company.

**653.** The passing of this Act shews that there was then a practice of issuing bonds, apparently in the form which we would now call bearer bonds, but leaving a blank for the creditor's name, the object of the actual blank being that if and when desired the holder for the time being should be able to insert his own name. This practice had obtained the force of law. It is precisely reproduced in modern times in the case of postal orders (as distinguished from P.O. money orders) which, if sent off blank, do in fact, within their time-limit, regularly pass from hand to hand, practically as currency, until the last holder fills in his name; the object being to save the P.O. charges for new orders.

**654.** The reason alleged for the old practice is that it saved the expense of assignments, so long as the blank was allowed to remain. The reasons alleged against it in the preamble of the Act are that it led to fraud and contentions. By that, it appears, was meant that the

debtor was injured by being debarred from pleading compensation and other similar defences against subsequent holders, the bond being, as we should now say, transferable free from equities; and that creditors of the creditor were injured by the ease and secrecy with which the asset could be, really or *ex facie*, put beyond their reach.

**655.** It will be observed that the Act is not limited to bonds, but expressly mentions dispositions. There have been cases where the Act has had to be considered with relation to land rights, but it is not known that there had been any attempt to adopt a system of blank titles so as to make land transferable by delivery of the old writ. At any rate any such idea is now unknown, whereas bearer bonds now represent a large and important class of investments.

**656.** The Act applies the nullity to (a) the subscription and delivery, or (b) the delivery if later, and in the latter case avoids the nullity if before delivery the blank is filled in in presence of the witnesses who attested the subscription. The Act does not require (1) that the granter should be present when the blank is filled up; (2) that the witnesses should sign again; and it may be doubted whether the Act requires (3) that the witnesses should see the actual act of filling-up, if they see the completed document at or before delivery, or (4) that the witnesses should in any way act together.

**657.** A cautionary obligation for a composition in favour of "the creditors of H" was held not to be affected by the Act.<sup>1</sup>

**658.** Though the Act is absolute in its terms, the decisions shew that, according to circumstances, it may operate to cut down the whole deed or only a part. In a conveyance the first grantee being named, and the blank being in the name of a substitute, the right of the former is not defeated.<sup>2</sup>

### SECTION 3.—EFFECT OF BLANKS AT COMMON LAW.

#### SUBSECTION (1).—*Actual Blanks.*

**659.** The common law also operates to render ineffectual in whole or in part deeds which contain material blanks, and the common law is broader than the Act, for the Act relates only to the name of the grantee, whereas the common law applies to all material blanks. Thus a bond blank as to the sum is ineffectual at common law, and the omission cannot be supplied by parole.<sup>3</sup> A document delivered blank and filled up afterwards is open to the objection that to that extent it is not the deed of the granter. There is no authority to the grantee of a bond to fill in a sum which the stamp will cover, though such a mandate is given in the case of bills and promissory notes.<sup>4</sup> It is on the same ground that nothing new can be allowed to be inserted in the testing clause.<sup>5</sup> As to the onus of proof when a deed as produced

<sup>1</sup> *Clapperton, Paton & Co. v. Anderson*, 1881, 8 R. 1004.

<sup>2</sup> *Abernethie v. Forbes*, 1835, 13 S. 263.

<sup>4</sup> Bills of Exchange Act, 1882, s. 20.

<sup>3</sup> *Dickson on Evidence*, ss. 658, 1076.

<sup>5</sup> *Blair v. Assets Co.*, 1896, 23 R. (H.L.) 36.

is regular and complete, but it is averred that it was blank at the time of subscription, see the cases undernoted.<sup>1</sup>

SUBSECTION (2).—*Words Written on Erasure.*

**660.** In the case of words written on erasure, it is necessary to draw a distinction according as the alteration is authenticated in the testing clause or is not. If there is no authentication, the words are held *pro non scriptis*, the effect of which will depend on their nature and the clause in which they occur. But though the words on erasure, unauthenticated, cannot receive effect, the objector is not entitled "to read anything he pleases in their place, even to the destruction of the deed."<sup>2</sup> But if fraud is an element in the case, the whole deed may go.<sup>3</sup> This applies to erasures, and also to that other kind of blank which is caused by the deletion of words so as to be illegible.

**661.** For practical present-day purposes perhaps most importance attaches to the question of the effect of erasures which are purported to be authenticated in the testing clause. Professor Montgomery Bell writes:<sup>4</sup> "the declaration or statement pointing out the words on erasure must itself be probative, otherwise it will go for nothing. . . . The testing clause ought to be written so far as to specify the erasures before the deed is subscribed." Testing clauses are often framed in this way, but just as often not—that is to say, many deeds with even important words written on erasure (and these are now much more common since the introduction of typed deeds) are engrossed only to the words "In witness whereof" before subscription, and the rest of the testing clause (that is, really, the whole of that clause) is inserted after subscription. It may therefore be that, on objection stated, and on these facts being proved, the words on erasure would need to be held *pro non scriptis*, with the possibility of serious results, and, it might be, professional responsibility. It has to be borne in mind that it is not competent to prove by the evidence of the writer or typist and witnesses (even if the latter knew) that the alterations were made at or before subscription.<sup>5</sup>

SECTION 4.—DEBENTURES AND DEBENTURE STOCK.

**662.** In the case of companies under the Companies Acts, it has been declared that notwithstanding the Scots Act, 1696, debentures and debenture stock may be to bearer.<sup>6</sup>

<sup>1</sup> *Ruddiman v. Merchant Maiden Hospital*, 1746, Mor. 11562; *Baillie v. Scott*, 1828, 6 S. 1016; *Donaldson v. Donaldson*, 1749, Mor. 9081.

<sup>2</sup> *M'Dougall v. M'Dougall*, 1875, 2 R. 814.

<sup>3</sup> *Merry v. Howie*, 1806, 5 Paton's App. 101; *Grant v. Murdoch*, 1830, 8 S. 734.

<sup>4</sup> Convey. p. 68.

<sup>5</sup> *Reid v. Kedder*, 1834, 12 S. 781; 1835, 13 S. 619; 1 Robinson's App. 183; *Shepherd v. Grant's Trs.*, 1844, 6 D. 464; 6 Bell's App. 153.

<sup>6</sup> Companies (Consolidation) Act, 1908, 8 Edw. VII. c. 69, s. 106.



# BLANK TRANSFER.

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## SECTION 1.—DEFINITION.

**663.** The phrase blank transfer<sup>1</sup> denotes a transfer of shares in a company, executed by the transferor, but blank in the name of the transferee, and usually blank also as to the date and the sum paid as consideration for the transfer. Such transfers are in use (1) as a means of transferring the property in shares, particularly in those cases where the company has issued share certificates with transfers printed on the back ; (2) as a means of constituting a security over shares, by depositing with the security-holder the share certificates together with transfers made out in blank. There has as yet been no decision in Scotland as to the adequacy of blank transfers as a means of conveying the right to shares in a company, but their effect has been considered in several cases in England.

## SECTION 2.—EFFECT OF BLANK TRANSFER IN ENGLISH LAW.

**664.** According to the English authorities a blank transfer is not a deed, and, consequently, if the transfer of shares in the particular company requires a deed—as in the case of companies incorporating the Companies Clauses Act,<sup>2</sup> or in exceptional cases, under the Articles of Association of a company registered under the Companies Act, 1908—it is not an effectual method of constituting a right to the shares. The company is not bound to register the transfer; the party who takes it has no authority to fill up the blanks and send it in for registration; should registration be in fact obtained, the transferee still holds the shares subject to any equities that were binding on the transferor.<sup>3</sup>

<sup>1</sup> See Wilton, *Company Law*, p. 623; Buckley, *Companies Acts*, 10th ed., p. 56; Lindley, *Company Law*, 5th ed., p. 471; Stiebel, *Company Law*, 2nd ed., p. 340.

<sup>2</sup> Companies Clauses (Consolidation) Act, 1845 (8 & 9 Vict. c. 16, s. 14); Companies Clauses (Scotland) Act, 1845 (8 & 9 Vict. c. 17, s. 14).

<sup>3</sup> *Société Générale de Paris v. Walker*, 1885, 11 App. Cas. 20; *Powell v. London and Provincial Bank*, [1893] 1 Ch. 610; 2 Ch. 555; Buckley, *Companies Act*, 10th ed., p. 580; Palmer, *Company Precedents*, 12th ed., i. 643.

All the transferee acquires is a right to demand a transfer in legal form.<sup>1</sup>

**665.** Where, as in the case of most companies under the Companies Act, 1908, the articles do not require a transfer to be by deed,<sup>2</sup> the holder of blank transfers is entitled to fill up the blanks and send the transfers in for registration. Although until registration his right to the shares is not complete, he has obtained a right in security which is not affected by the bankruptcy of the registered holder, and may be completed by registration after that event.<sup>3</sup> He remains subject to the risk of a fraudulent transfer by the registered holder to a *bona fide* purchaser, and prior registration by him.<sup>4</sup>

### SECTION 3.—BLANK TRANSFER IN SCOTLAND.

**666.** The question whether the distinction between transfers which do and which do not require a deed is applicable to Scotland was argued in *Shaw v. Caledonian Rly.*,<sup>5</sup> but the facts of the case rendered a decision unnecessary.

**667.** It is also possible that a blank transfer might be held to be null as an obligation under the Act 1696, c. 25, "anent blank bonds and trusts." This Act strikes at instruments delivered blank in the name of the granter, and its operation is not confined to bonds, but extends to other deeds.<sup>6</sup> There is, indeed, a somewhat vague exception to the Act, by which it is probable that documents *in re mercatoria* are exempted from its provisions,<sup>7</sup> but it does not appear likely that a transfer of a share, an instrument which requires to be authenticated by witnesses, would be held to fall within that class. In one case the objection was taken that the share transfers (which were afterwards registered) had been delivered in blank, but it was held upon the evidence that the plea was not supported by the facts, and no decision was pronounced upon it.<sup>8</sup> Probably owing to these difficulties, blank transfers are rarely used in Scotland as a means of constituting a security over shares.<sup>9</sup>

### SECTION 4.—BLANK TRANSFER AS A SECURITY.

**668.** Assuming that blank transfers would be held to be outwith the purview of the Act 1696, c. 25, and that in the particular case a transfer by deed was not required, it is still a question how far they form an effectual security according to the law of Scotland. As Scots law

<sup>1</sup> *Powell, cit.*; *Roots v. Williamson*, 1888, 38 Ch. D. 485.

<sup>2</sup> See usual form in Palmer, 12th ed., i. 643.

<sup>3</sup> *Colonial Bank v. Hepworth*, 1887, 36 Ch. D. 36; *Colonial Bank v. Whinney*, 1886, 11 App. Cas. 426; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120.

<sup>4</sup> *Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296.

<sup>5</sup> 1880, 17 R. 466.

<sup>6</sup> *Pentland v. Hare*, 1829, 7 S. 640.

<sup>7</sup> See *Bovill v. Dixon*, 1856, 3 Macq. 1; *Duncan's Trs. v. Shand*, 1872, 10 M. 984.

<sup>8</sup> *Shaw v. Caledonian Railway*, *supra*.

<sup>9</sup> See evidence as to banking practice in *Crerar v. Bank of Scotland*, 1921 S.C. 736,

does not admit of a security by the deposit of title deeds,<sup>1</sup> it is clear that the mere deposit of a share certificate gives a lender no right which could be maintained in a question with the trustee in the borrower's sequestration; and, when such a deposit was followed, after an interval of three weeks, and within sixty days of the shareholder's bankruptcy, by a transfer duly registered, it was held that the registration was reducible, as a security for prior debt, under the provisions of the Bankruptcy (Scotland) Act, 1696.<sup>2</sup> If, together with the share certificate, a blank transfer is delivered, then, as the transferee's right may be completed without any further intervention by the transferor, registration, though within the sixty days of constructive bankruptcy, will give a complete security.<sup>3</sup> In *Morrison v. Harrison*<sup>4</sup> it was held that the transferee of shares might complete his right by registration even after the sequestration of the transferor, provided that he did so before the trustee in the sequestration had taken steps to secure registration. In *Morrison* the transfers were fully made out, but the reasoning would seem to cover the case of a transfer in blank. It would thus appear that a lender, who has received share certificates with blank transfers, has obtained a right which, with due watchfulness on his part, will safeguard him in the event of the borrower's bankruptcy. But he has obtained no safeguard against the borrower's dishonesty. Should the latter execute a new transfer to a third party, and should that third party register his transfer with the company, there is no doubt that his title would be complete, assuming that he had no notice of the fact that the shares had been hypothecated. Nor could the holder of the blank transfers, as a rule, maintain any action against the company. A company, in practice, demands the production of share certificates before registering a transfer, but lies under no obligation to do so, and incurs no liability if, accepting the transferor's explanation of the want of the certificates, it registers a transfer without them.<sup>5</sup> The fact that the certificates bear a note to the effect that no transfer will be registered without their production (a feature present in both the cases just cited) does not affect the question. Such a note is a mere representation of intention, on which no one can found; it is not a contract with anyone who may have an interest in the shares.

#### SECTION 5.—RIGHTS OF HOLDER OF BLANK TRANSFER.

**669.** The holder of share certificates, with blank transfers, as a security for debt, is entitled, in a question with the debtor, to sell the

<sup>1</sup> *Christie v. Ruxton*, 1862, 24 D. 1182; *Robertson v. British Linen Co.*, 1891, 18 R. 1225.

<sup>2</sup> Act 1696, c. 5; *Gourlay v. Mackie*, 1887, 14 R. 403.

<sup>3</sup> *Guild (Kettle's Tr.) v. Young*, 1884, 22 S.L.R. 520; see also *Scottish Provident Institution v. Cohen*, 1888, 16 R. 112.

<sup>4</sup> 1876, 3 R. 406.

<sup>5</sup> *Rainford v. Keith & Blackman Co.*, [1905] 1 Ch. 296; 2 Ch. 147; followed in *Guy v. Waterlow Bros. & Layton, Ltd.*, 1909, 25 T.L.R. 515.



shares on giving reasonable notice of his intention to do so.<sup>1</sup> He can at any time send in his transfers for registration, and the company, in the absence of any notice of objection, is bound to register.<sup>2</sup> Should objection to the transfer be intimated by the registered holder of the shares, the proper course for the company, it has been laid down, is to call upon the objector to interdict the transfer, with an intimation that, on his failure to do so within a specified time, registration will be granted.<sup>3</sup> It has been decided in England, though the decision might not be followed in Scotland without hesitation, that a registered shareholder who has granted a transfer owes a duty to anyone who may be in right thereof not to impose any obstacle to registration, and therefore that he was liable in damages when, on a mistaken view of his rights, he intimated an objection, with the result that registration was delayed so long that the shares had become unsaleable.<sup>4</sup>

SECTION 6.—BLANK TRANSFER IN HANDS OF THIRD PARTIES  
—QUASI-NEGOTIABILITY.

**670.** When a transfer is executed in blank, and handed over with the share certificates, it passes from one party to another by mere delivery. Questions in consequence have arisen as to the rights acquired by a party who has taken such a document in good faith and for value, without any notice that his author has no right to transfer them. What right can such a party assert over the shares in a question with the registered shareholder, who issued the transfer in blank? It is not, perhaps, possible to answer the question definitely. It is decided in England that certificates with transfers endorsed on the back are not, even if these transfers are executed in blank, negotiable instruments.<sup>5</sup> Therefore, if they are transferred by a person who has no title at all, such as a thief or finder, the party taking them, though himself in good faith, would acquire no right to the shares. And when A. deposited share certificates with blank transfers with B., and B. pledged them with C. for his own debt, it was held that C. had no higher title than his author had, and could not assert against A. any right to retain the shares which would not have been good in a question between A. and B. This was held on the ground that when a person takes an instrument containing blanks, he is put on his inquiry as to what is the actual right of the party from whom he takes it.<sup>6</sup> But where the transfers and certificates are issued in a state in which they are "in order," that is, in a state in which they would be accepted by mercantile men without further inquiry, it would seem now to be held that the owner of the shares is estopped by his conduct in so issuing them from denying, in a question with a *bona fide* holder for value,

<sup>1</sup> *Stubbs v. Slater*, [1910] 1 Ch. 632.

<sup>2</sup> *Palmer, Company Precedents*, 12th ed., i. 643.

<sup>3</sup> *Shaw v. Caledonian Railway*, 1890, 17 R. 466.

<sup>4</sup> *Hooper v. Herts*, [1906] 1 Ch. 549.

<sup>5</sup> *Colonial Bank v. Cady & Williams*, 1890, 15 App. Cas. 267; *France v. Clark*, 1884, 26 Ch. D. 257.

<sup>6</sup> *France v. Clark*, *supra*.



that the party to whom they were issued had a right to transfer them. Thus executors gave to their stockbroker certificates with transfers executed in blank, in order to have the shares transferred to their name. The stockbroker fraudulently pledged them with a bank, while still in blank. It was held that certificates with transfers signed by an executor of the party whose name appeared as owner of the shares were not "in order," and, therefore, that the bank obtained no better title than their author had.<sup>1</sup> But Lord Herschell, dealing with the case of transfers executed by the registered owner, expressed himself as follows: "The case seems to me to differ essentially from that of a transfer signed by a registered owner. He must presumably have signed it with the intention at some time or other of effecting a transfer. No other reasonable construction can be put on his act. And if he intrusts it in that condition to a third party, I think those dealing with that third party have a right to assume that he has authority to complete a transfer."<sup>2</sup>

**671.** A bank is entitled to assume that a stockbroker, in possession of share certificates with transfers executed in blank, has authority to pledge them.<sup>3</sup> And if blank transfers are given to an agent in order to negotiate a loan, the lender will be secure even although the agent may have exceeded his instructions.<sup>4</sup>

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<sup>1</sup> *Colonial Bank v. Cady & Williams*, 1890, 15 App. Cas. 267.

<sup>2</sup> *Ibid.*, p. 286.

<sup>3</sup> *Fuller v. Glyn, Mills, Currie & Co.*, [1914] 2 K.B. 168; see *National Bank v. Dickie's Tr.*, 1895, 22 R. 740.

<sup>4</sup> *Hooper v. Herts*, [1906] 1 Ch. 549; *Fry v. Smellie*, [1912] 3 K.B. 282.

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## BLASPHEMY.

*See* CRIME.

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## BLAZON.

*See* MESSENGER-AT-ARMS.

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## BLEACHING.

*See* FACTORIES AND WORKSHOPS; LIEN; SERVITUDES.

## BLENCH.

*See* SUPERIOR AND VASSAL.

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## BLIND PERSONS.

*See* BORROWING POWERS; DEEDS; OLD AGE PENSIONS;  
WAR CHARITIES.

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## BLOCKADE.

*See* INTERNATIONAL LAW.

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BOARD OF AGRICULTURE AND  
FISHERIES.

BOARD OF GREEN CLOTH.

BOARD, GENERAL, OF CONTROL.

BOARD OF SUPERVISION.

BOARD OF TRUSTEES FOR  
MANUFACTURES.

## BOARD OF TRUSTEES FOR THE NATIONAL GALLERIES OF SCOTLAND.

*See* OFFICERS AND DEPARTMENTS OF STATE.

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## BOARD OF TRADE.

*See* ACCIDENT; OFFICERS AND DEPARTMENTS OF STATE;  
RAILWAY.

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## BOARDING HOUSE.

*See* INNS AND INNKEEPERS.

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## BOAT.

*See* SHIP.

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## BOILERS.

*See* ACCIDENT.

# BONA ET MALA FIDES.

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## SECTION I.—INTRODUCTORY.

**672.** In the law of Scotland the doctrine of *bona fides* is usually found as the basis of a plea in defence to a claim of restitution or a charge of responsibility for illegal or wrongous acting. The plea of *bona fides* has been described as being a shield and not a sword;<sup>1</sup> it is solely a defence and cannot be the foundation for an action. For *bona fides*, however strong, cannot create or give any right whatever.<sup>1</sup> It may keep alive what has been struck with a mortal wound, but it cannot raise the dead nor bring into existence what did not exist before.<sup>2</sup>

**673.** *Bona fides* implies certain opinions and beliefs. Since these are hidden states of the mind and not directly susceptible of verification, the existence of *bona fides* in law is made a matter of presumption from facts and circumstances. The presumption is for *bona fides* unless a contrary probation or vehement presumption be for *mala fides*.<sup>3</sup> *Bona*

<sup>1</sup> Per Lord Neaves in *Menzies v. Menzies*, 1863, 1 M. 1025.

<sup>2</sup> Jeffrey's argument in Bell's Account of a Putative Marriage.

<sup>3</sup> Stair (More's ed.), ii. 12, 7; *Smith and Beaton, Petrs.*, Feb. 6, 1810, F.C.



*fides* is presumed in acts which are *prima facie* legal and regular, *mala fides* in those which are *prima facie* illegal and irregular.<sup>1</sup>

## SECTION 2.—BONA FIDE POSSESSION.

### SUBSECTION (1).—General.

674. A *bona fide* possessor is one who, though he be not truly proprietor of the subject which he possesses, yet believes himself proprietor upon probable grounds and with a good conscience.<sup>2</sup> A *mala fide* possessor possesses a subject not his own, and knows at the same time, or may upon the smallest reflection know, that he is not the rightful owner.<sup>3</sup> *Mala fides* is presumed where the possessor has no title;<sup>4</sup> where it appears *ex facie* of his title that he has no right of possession;<sup>5</sup> where the entry to the possession is obtained in some illegal, fraudulent, or irregular way;<sup>6</sup> where the title bears its own dittay *in gremio*<sup>7</sup> or contains something which lays on the possessor a duty of closer inspection and further inquiry;<sup>8</sup> where there is a violation of the positive rules of statute law<sup>9</sup> or of other rules of law which the possessor is held bound to know.<sup>10</sup> When a person is left two alternative provisions under a will and it is clear that he is only entitled to one of the two, he cannot be held *in bona fide* if he accepts and consumes both. But where it is doubtful whether the provisions are intended to be alternative or cumulative, he may be *in bona fide* to accept both, particularly if he acts on legal advice.<sup>11</sup>

### SUBSECTION (2).—When does *Bona fides* cease?

675. The point at which *bona fides* ceases and *mala fides* emerges depends upon the circumstances of each case. Mere uncertainty is not sufficient to induce *mala fides*, and generally there must be some sort of legal interpellation.<sup>12</sup> In some cases *bona fides* has been held to cease from the date of citation in an action in which the defender's grounds of belief are contradicted or challenged, but in general *bona fides* will not be held to cease till after the first judgment setting it aside has been pronounced, provided this judgment stands without being altered through the various stages of the litigation. In cases where the point is attended with difficulty, *bona fides* will not be held to cease till the

<sup>1</sup> Stair, *loc. cit.*

<sup>2</sup> Ersk. ii. 1, 25.

<sup>3</sup> *Ibid.*; Blair v. Bruce-Stewart, 1783, Mor. 1775.

<sup>4</sup> Magistrates of Dunbar v. Kelly, 1829, 8 S. 128

<sup>5</sup> Justice v. Ross, 1829, 8 S. 108; Bontine v. Graham, 1838, 1 D. 286; Gray v. Walker, 1859, 21 D. 709; Moir v. Glen and Easton, 1831, 9 S. 744.

<sup>6</sup> Gray v. Watson, 1672, Mor. 1755; Kibble v. McDonald and Johnstone, 1832, 10 S. 341.

<sup>7</sup> Cardross v. Hamilton, 1711, Mor. 1747.

<sup>8</sup> Walker v. Craig, 1833, 7 W. & S. 82.

<sup>9</sup> Duke of Atholl v. Dalgleish, 1822, 1 S. 549; Purves' Trs. v. Purves, 1895, 22 R. 513.

<sup>10</sup> Grant v. Grant, 1633, Mor. 1743; Clyne v. Clyne's Trs., 1839, 2 D. 243.

<sup>11</sup> Johnston v. Johnston, 1875, 2 R. 986.

<sup>12</sup> More's Notes to Stair, l.; Rankine on Land-Ownership, p. 81.

ultimate judgment setting it aside has been pronounced.<sup>1</sup> Lord Justice-Clerk Moncreiff stated the rules thus: "First, when the possession has commenced in good faith it lies with the true owner to shew when it ceased to be so before the right to demand violent profits can prevail; secondly, when possession has been continued during a litigation regarding the title of the possessor it is sufficient to support the possessor's plea of *bona fides* that he had *probabilis causa litigandi*; and, third, that the principle is equally applicable whether the possession be challenged in respect of want of title in the possessor's author or in respect of the nature and conditions of his own right."<sup>2</sup>

SUBSECTION (3).—*Bona fide Perception and Consumption.*

**676.** Under the civil law a *bona fide* possessor was liable to restore to the true owner the fruits that were extant or not consumed at the time when his *bona fides* ceased, and his right was expressed in the maxim "*Bona fide possessor facit fructus perceptos et consumptos suos.*" In Scots law perception alone suffices to vest the property of the fruits in the possessor, provided it has been made in due course and not in anticipation of his being dispossessed. The rule is not that the possessor is bound to restore and that the right to retain is an exception, but that he is entitled to retain the fruits, and the burden of proving fraudulent or *mala fide* occupancy lies on a claimant. The restoration of the fruits is rather a penalty against the person who got possession fraudulently than a right following on the property.<sup>3</sup>

**677.** In the case of crops *messis sementem sequitur*, and he who sows in *bona fide* is entitled to reap the crop.<sup>4</sup> Civil and industrial fruits such as rents and interest also come under this doctrine,<sup>5</sup> and perception of these is reckoned as at the date when they fell due, although in point of fact they may not have been paid.<sup>6</sup> In virtue of the Apportionment Acts, civil fruits would appear to accrue to the *bona fide* possessor from day to day.<sup>7</sup> The doctrine applies only to the fruits of the subject and has no application to wrong payments—not of fruits but of the subject itself.<sup>8</sup>

**678.** The defence of *bona fide* consumption applies where a person has consumed the fruits not being the true owner of a subject, but being in the *bona fide* belief under some colourable title that he is; and such a defence is irrelevant where the defender admits the title to the property to be in the pursuer and pleads that he thought no debt was

<sup>1</sup> More's Notes to Stair, l. ; *Cleghorn v. Elliott*, 1842, 4 D. 1389 ; *Menzies v. Menzies*, 1863, 1 M. 1025 ; Ersk. ii. 1, 29.

<sup>2</sup> *Houldsworth v. Brand's Trs.*, 1876, 3 R. 304.

<sup>3</sup> Per Lord Glenlee in *Agnew v. Earl of Stair*, 1826, 4 S. 604 ; 3 W. & S. 286.

<sup>4</sup> Ersk. ii. 1, 26.

<sup>5</sup> *Ferguson v. Lord Advocate*, 1906, 14 S.L.T. 52 ; *Morrison v. School Board of St Andrews*, 1918 S.C. 51.

<sup>6</sup> *Lesly v. Lesly*, 1745, Mor. 1723.

<sup>7</sup> Rankine on Land-Ownership, p. 85.

<sup>8</sup> *Darling's Trs. v. Darling's Trs.*, 1909 S.C. 445.

due.<sup>1</sup> Nor is it a relevant defence for a heritor against the claim of a stipendiary minister for arrears of stipend, though it would be relevant as against a titular; for while the titular is a proprietor, the stipendiary minister is a mere creditor having a claim for money that may be counted, not for fruits that may be reaped.<sup>2</sup> There has been some divergence of judicial opinion as to whether the defence of *bona fide* consumption is only pleadable where parties are contending on competing titles or whether it is enough to let in the doctrine if there are two adverse and competing rights under the same title. The point has not been settled, but is referred to in the undernoted cases.<sup>3</sup> It has also been doubted whether such a defence is one which the Crown would be entitled to maintain.<sup>4</sup>

**679.** A *bona fide* possessor is not entitled to appropriate the annual fruits of an estate unless upon condition of keeping down the annual burdens; but it is different with the principal of a debt; and rents *bona fide* received do not fall to be imputed to extinguish real burdens over the estate constituted in favour of the possessor.<sup>5</sup>

**680.** A *mala fide* possessor must restore to the true owner not only those fruits which he actually reaped but also those which his carelessness or lack of industry prevented him from reaping.<sup>6</sup> In the case of civil fruits he must restore with interest running from a time fixed by the Court according to circumstances.<sup>7</sup>

#### SUBSECTION (4).—*Recompense.*

**681.** *Inædificatum solo solo cedit* and buildings erected or improvements made on the property of another belong to the owner of the ground. Before any claim for recompense can arise, the labour and expense must have been bestowed either with the direct intention of benefiting the party against whom the claim is made or in the *bona fide* belief that the subject belongs to the person by whom the expense or labour is bestowed.<sup>8</sup> No law subjects a man to recompense who reaps an occasional or consequential benefit from the deed of another done with no view to his interest.<sup>9</sup> Where such a claim is competent, the party who has made the expenditure is entitled to retain the property until he is repaid, not necessarily the amount expended, but the amount by which through the expenditure the proprietor is *lucratus* at the date when the claim is made.<sup>10</sup> No recompense is exigible in respect of

<sup>1</sup> *Macrae v. Assets Co.*, 1894, 21 R. 1080.

<sup>2</sup> *Haldane v. Ogilvy*, 1871, 10 M. 62.

<sup>3</sup> *Huntly's Trs. v. Hallyburton's Trs.*, 1880, 8 R. 50; *Evans v. Harkness*, 1890, 17 R. 931; *Morrison v. School Board of St. Andrews*, 1918 S.C. 51.

<sup>4</sup> *Earl of Cawdor v. Lord Advocate*, 1878, 5 R. 710. <sup>5</sup> *Cleghorn v. Elliott*, 1842, 4 D. 1389.

<sup>6</sup> *Children of Wolmet v. Douglas and Cunningham*, 1662, Mor. 1730.

<sup>7</sup> *Sinclair v. Sinclair*, 1847, 10 D. 190; *Macpherson v. Tyler*, 1850, 12 D. 486.

<sup>8</sup> *More's Notes to Stair*, liv.; *Duff, Ross & Co. v. Kippen*, 1871, 8 S.L.R. 299; *Newton v. Newton*, 1925, S.L.T. 476.

<sup>9</sup> *Burns v. M'Lellan's Crs.*, 1735, Mor. 13402.

<sup>10</sup> *York Buildings v. Mackenzie*, 1795, 3 Pat. 378 and 579; *Binning v. Brotherstones*, 1676, Mor. 13401.



enhanced value attaching to the estate independently of such expenditure.<sup>1</sup>

**682.** A claim for recompense founded on *bona fide* possession necessarily implies a bad title, for with a good title no question could arise.<sup>2</sup> It is not necessary, however, that there should be any title at all if there was a *bona fide* belief on the part of the claimant that the property was his own.<sup>3</sup> The existence of this belief is provable *pro ut de jure*.<sup>3</sup> Accordingly a husband's claim for recompense in respect of meliorations was sustained where, although he had taken the title of a house in his wife's name, he had paid for it and believed that it belonged to him.<sup>3</sup> On the other hand, the absence of a title may be an indication of *mala fides*. In one case parties obtained the lease of a mill for twenty years, stipulating that at the end of that period they were to receive compensation for improvements or obtain a new lease. Without getting a renewal of the lease they possessed for a second term of twenty years, and then obtained a charter of two-thirds of the ground and erected works and machinery on the whole of it. The charter was later reduced as void, and it was held that the parties had no claim for meliorations on the one-third of the ground for which they had no charter, nor for erections made on the two-thirds prior to the charter, but their claim was allowed for improvements between the date of the charter and the decree of reduction.<sup>4</sup> Their title bore its ditty in *gremio* and so they could not be ignorant of the nullity and defect of their own right.<sup>5</sup>

**683.** In cases of this nature the claimant, in order to succeed, must shew that the error in respect of which recompense is claimed is a justifiable and excusable one, made in *bona fide*, and must exclude the possibility that he has been acting *in suo*.<sup>6</sup> Thus if he has a reversionary interest it must be made very clear that he has not been acting with a view to increasing that reversion.<sup>7</sup> A husband improving his wife's property has generally no claim against her heir for recompense although he may be entitled to recompense where he had reasonable expectations which were disappointed by his wife secretly revoking a settlement in his favour.<sup>8</sup> Similarly a liferenter spending money in improving the subject of his liferent is presumed to do so for the purpose of enhancing his own benefit and enjoyment, but the presumption may be rebutted by facts and circumstances, *e.g.* if the liferenter made the expenditure in the erroneous belief that he was fiar.<sup>9</sup> Where a person manages property in which he and others are jointly interested, the presumption is against any allowance for management, but the circumstances may be sufficient to overcome the presumption. So where by a family arrange-

<sup>1</sup> *Douglas v. Douglas's Trs.*, 1864, 2 M. 1379; Rankine on Land-Ownership, pp. 86-94.

<sup>2</sup> *Buchanan v. Stewart*, 1874, 2 R. 78.

<sup>3</sup> *Newton v. Newton*, 1925, S.L.T. 476; but cf. *Soues v. Mill*, 1903 (O.H.), 11 S.L.T. 98.

<sup>4</sup> *Magistrates of Selkirk v. Clapperton*, 1830, 9 S. 9.

<sup>5</sup> *Cardross v. Hamilton*, 1711, Mor. 1747.

<sup>6</sup> *Buchanan v. Stewart*, *supra*; *Soues v. Mill*, *supra*.

<sup>7</sup> *Selby's Heirs v. Jollie*, 1795, Mor. 13438; *Burns v. McLellan's Crs.*, 1735, Mor. 13402.

<sup>8</sup> *Reedie v. Yeaman*, 1875, 12 S.L.R. 625. <sup>9</sup> *Morrison v. Allan*, 1886, 13 R. 1156.



ment a farm was carried on under the management of one brother for behoof of all, and he believed *bona fide* that by the arrangement the farm had been handed to him for his own benefit, it was held that he was entitled to remuneration.<sup>1</sup>

684. A *mala fide* possessor of another's property is not entitled to recompense for meliorations,<sup>2</sup> still less it would appear for necessary outlays which do not increase the value of the subject,<sup>3</sup> but he may have the right to remove the building or its materials.<sup>4</sup>

### SECTION 3.—BONA FIDE PAYMENT.

#### SUBSECTION (1).—*General.*

685. Payment made to a person having no right to it will extinguish the obligation and liberate the debtor if it is made *in bona fide* and the debtor neither knew nor was bound to know that the payee had no right to the debt.<sup>5</sup> In such a case the law secures the debtor and leaves the creditor to seek his remedy against the receiver of the payment. The ratio of the rule is that the creditor by his silence or improper conduct has misled the debtor as to his right and has thus induced him to make payment to the wrong person. The claim of the creditor is then barred by the payment made to the person who has the ostensible right to demand it.<sup>6</sup>

686. Payment made *in bona fide* to an agent by a debtor to whom the revocation of the agency has not been intimated liberates the debtor in a question with the principal.<sup>7</sup> Payment made by a debtor to his creditor liberates him from the claim of an assignee whose right has not been intimated. So payment made to a creditor in a bond which he has assigned or which has been adjudged will be effectual to the debtor if the assignee or adjudger has not previously intimated his right.<sup>8</sup> This was held even in the case of an apprising, which as a judicial assignation needed no intimation.<sup>9</sup> Where there are several *correi debendi*, whether principals or cautioners, intimation made to one suffices generally for all, but if one of the debtors to whom no intimation was made pays the cedent *in bona fide*, such payment liberates him and all the cautioners.<sup>10</sup>

687. The defence of *bona-fide* payment is excluded where the debtor ought to have known that the person to whom the payment was made had no right in law to demand it. So payment to a widow of one-third of a debt owing to her husband was not sustained because she had no right as widow to discharge any part of the debts owing to her

<sup>1</sup> *Anderson v. Anderson*, 1869, 8 M. 157.

<sup>2</sup> *Barbour v. Halliday*, 1840, 2 D. 1279; *Waugh v. More Nisbett*, 1882, 19 S.L.R. 427.

<sup>3</sup> *Binning v. Brotherstones*, 1676, Mor. 13401.

<sup>4</sup> *Barbour v. Halliday*, *supra*; *Duke of Hamilton v. Johnston*, 1877, 14 S.L.R. 298.

<sup>5</sup> *Stair*, iv. 40, 29. <sup>6</sup> *More's Notes to Stair*, cxxiv.

<sup>7</sup> *Story on Agency*. <sup>8</sup> *Hamilton and Puget v. Earl of Rothes*, 1759, Mor. 1802.

<sup>9</sup> *Stair*, i. 18, 2, 3. <sup>10</sup> *Lyon v. Law*, 1610, Mor. 1786.

husband, and her claim of *jus relictæ* lay against the executor to whom alone the debts due to her husband could safely be paid.<sup>1</sup> Payment of a heritable debt to a person who had expedite a general service and was believed to be heir but had not expedite an infeftment in his person, and had therefore no title to discharge the debt, was held not to be *bona fide* payment.<sup>2</sup> So where a bank paid a deposit of £1000 to a party producing a decree dative as executor and confirmation to £20 of the £1000, and it was subsequently found that the executor had no right to the office nor to the fee of the £1000, the bank was held liable to pay £980 to the parties having a right to the fee.<sup>3</sup> Similarly the defence of *bona-fide* payment does not apply to payment made to a messenger executing a poinding, for there is no presumption that such a messenger has a mandate from the user of the diligence to receive payment.<sup>4</sup>

688. The defence of *bona-fide* payment applies only to necessary deeds, not to voluntary acts such as lending money.<sup>5</sup> And the defence can be pleaded only where payment or something equivalent thereto has in fact been made; no acknowledgment of payment or discharge simulatively or freely granted without true and real payment is sufficient to release the debtor in a question with the creditor.<sup>6</sup>

#### SUBSECTION (2)—*Landlord and Tenant.*

689. A tenant is in safety to make payment of his rent to the person by whom the lands were let to him and whom he recognises as his landlord until, either by judicial process or by the intimation of an assignation to the rents, the tenant is interpellated from making such payments.<sup>7</sup> Even where lands were adjudged and a decree of maills and duties taken against the tenant by the adjudger, but no charge given upon the decree nor any claim made against the tenant for a long time after it was pronounced, it was held that the tenant was *in bona fide* to pay the rent to his landlord, and such payment would discharge the claim of the adjudger.<sup>7</sup> So if a heritable creditor, after intimating his assignation to the rents, should stand off and not uplift them, the tenant would be entitled to pay them to the landlord and receive a discharge which would be effectual against the creditor.<sup>7</sup> Payment by tenants to their old landlord was found a relevant defence against singular successors who, though publicly infeft, had used no diligence to put the tenants *in mala fide*.<sup>8</sup>

690. The *bona fides* of the debtor ceases generally after citation given by anyone having an interest in the subject interpellating the debtor from making payment.<sup>9</sup> To prevent collusion between landlords and tenants to the prejudice of third parties, payment of rent made by

<sup>1</sup> *Mackie v. Dumber*, 1628, Mor. 1788.      <sup>2</sup> *Halkerton v. Drummond*, 1729, Mor. 1799.

<sup>3</sup> *Buchanan v. Royal Bank of Scotland*, 1842, 5 D. 211.      <sup>4</sup> Ersk. iii. 4, 3.

<sup>5</sup> *Hunter v. Peter's Crs.*, 1670, Mor. 1687.      <sup>6</sup> Stair, i. 18, 2, 3, and i. 18, 5, 5.

<sup>7</sup> More's Notes to Stair, exxiv.      <sup>8</sup> *Lothian v. Vassals of Jedburgh*, 1634, Mor. 14087.

<sup>9</sup> Ersk. ii. 1, 29; More's Notes to Stair, exxiv.

a tenant to the landlord before the term of payment is presumed to be collusive in a question with the landlord's creditor or singular successor, and the defence of *bona fide* payment is not open to the tenant.<sup>1</sup> Thus the defence was repelled in the case of a tenant in whose hands the landlord's creditor had arrested the current rents before the term although the arrestment was used after the payment was made.<sup>2</sup> But the presumption does not hold where the forehand payment is according to the tack or the custom of the barony, nor where the payment is made before the conventional term but after the lapse of the legal term.<sup>3</sup> Even where payment was admittedly forehand, in an action against a tenant at the instance of the trustee for the landlord's creditors the defence of *bona fide* payment was sustained on the ground that the trustee took the right *tantum et tale* as it existed in the person of the landlord, who could not have demanded second payment.<sup>4</sup>

SUBSECTION (3).—*Superior and Vassal.*

691. The presumption applicable to payments by tenants holds also in payments made by a vassal to his superior before the term, but in common debts where creditor and debtor are not connected by any such relationship as raises a presumption of collusion, the debtor may safely pay before the term of payment.<sup>5</sup>

SUBSECTION (4).—*Heritor and Minister.*

692. The defence of *bona fide* payment was sustained in the case of payment made by heritors to their ministers who were allowed to continue to preach though they had not obtained presentation or collation in terms of statute, since no process, civil or ecclesiastical, was intended against them or the heritors before payment.<sup>6</sup> So where a minister, though deposed, had continued to preach after the term, payment made before intimation of the deposition was held *in bona fide*; but it was otherwise with payments made after intimation.<sup>7</sup>

SUBSECTION (5).—*Trustees and Executors.*

693. Trustees in distributing the trust estate are bound to pay it away to the party in right to receive it and are liable to that party if they pay it away to another.<sup>8</sup> In some cases, however, the facts necessary to be known in order to point out the true person entitled may be beyond the knowledge and fairly possible discovery of the

<sup>1</sup> *Lady Traquair v. Houston*, 1667, Mor. 10024.

<sup>2</sup> *Cleghorn v. Tenants*, 1628, Mor. 10022.

<sup>3</sup> *York Buildings Co. v. Garden*, 1736, Mor. 1784; *Earl of Lauderdale v. Tenants of Swinton*, 1662, Mor. 10023.

<sup>4</sup> *Davidson v. Boyd*, 1868, 7 M. 77.

<sup>5</sup> Ersk. iii. 4, 4.

<sup>6</sup> *Collector of Vacant Stipends v. Parishioners of Maybole*, 1666, Mor. 1791.

<sup>7</sup> *College of Aberdeen v. Earl of Aboyne*, 1679, Mor. 14791.

<sup>8</sup> *Lamond's Trs. v. Croom*, 1871, 9 M. 662.



trustees, and in such cases their responsibility may be modified. If trustees and executors after six months pay away the funds, even to legatees, in the reasonable belief that all debts have been satisfied, they cannot be made personally responsible, although, if there was from the first a deficiency of funds, the legatees may be obliged to pay back what they have got to unpaid creditors.

**694.** Creditors are bound to make their claims in reasonable time, and if they so act as to induce executors to believe that the debt is abandoned or discharged they cannot make them responsible for acting on a belief which they themselves have created.<sup>1</sup> But mere *bona fides* will not protect trustees paying a creditor who has no proper title to the debt, *e.g.* a *curator bonis* who has not extracted his appointment or found caution.<sup>2</sup>

#### SECTION 4.—BONA FIDES AND CONTRACTUAL RIGHTS.

##### SUBSECTION (1).—*Singular Successors and Heritable Creditors.*

**695.** A singular successor purchasing a heritable subject *in bona fide* and on the faith of the record is entitled to be free from the personal obligations of his predecessor and takes the subject unaffected by any burden not appearing in his title or in the register.<sup>3</sup> A similar protection is accorded to heritable creditors by infestment, but not to adjudgers.<sup>4</sup> The rule applies whether the personal obligation is an obligation to grant a conveyance or a latent trust.<sup>5</sup> But the singular successor or creditor must act in all respects *in bona fide*, acquiring the subject onerously<sup>6</sup> and without notice of any right in a third party or of any circumstances imposing on him a duty of inquiry.<sup>7</sup>

**696.** A disposition taken in favour of such a purchaser, if onerous, is not reducible on the head of fraud on the part of his author alone; the fraud of the purchaser must also be put in issue.<sup>8</sup> Reduction on the head of fraud is good against gratuitous acquirers though not parties to the fraud.<sup>9</sup> A purchaser or creditor, however, is not secured by the mere fact that the record is clear if either he was aware of some prior right not appearing in it or, being in ignorance of such a right, he is

<sup>1</sup> *Stewart's Trs. v. Evans*, 1871, 9 M. 810; *Beith v. Mackenzie*, 1875, 3 R. 185; *Pattisson v. M'Vicar*, 1886, 13 R. 550.

<sup>2</sup> *Donaldson v. Kennedy*, 1833, 11 S. 740; *Buchanan v. Royal Bank of Scotland*, 1842, 5 D. 211.

<sup>3</sup> *Stodart v. Dalzell*, 1876, 4 R. 236.

<sup>4</sup> *Thomson v. Douglas Heron & Co.*, 1786, Mor. 10229.

<sup>5</sup> *Workman v. Crawford*, 1672, Mor. 10208; *Anderson v. Dempster*, 1702, Mor. 10213; *Thomson v. Douglas Heron & Co.*, *supra*; *Lang v. Dixon*, June 29, 1813, F.C.; *Petrie v. Forsyth*, 1874, 2 R. 214.

<sup>6</sup> *Auchinleck v. Williamson*, 1667, Mor. 10282; *Nisbet v. Cairns and Howden*, 1864, 2 M. 863.

<sup>7</sup> *Stodart v. Dalzell*, *supra*; *Marshall v. Hynd*, 1828, 6 S. 384.

<sup>8</sup> *Workman v. Crawford*, 1672, Mor. 10208.

<sup>9</sup> *Auchinleck v. Williamson*, *supra*.



made aware of facts which should put him on his inquiry.<sup>1</sup> It is in each case a question of circumstances whether the facts brought to his notice are sufficient to impose on him a duty to inquire. But mere suspicion or hearsay knowledge is not enough. There must have been intimation to him of the third party's right or something equivalent thereto, or the relation of the parties must have been such as to make it his duty to communicate with the third party.<sup>2</sup> While a *bona fide* purchaser obtains generally all that the record discloses if conveyed over to him, he is not entitled to object to the rectification of a mistake in the recorded title imposing on the superior an obligation which is not a proper feudal burden, if in fact he did not purchase the property on the faith of the mistake.<sup>3</sup>

SUBSECTION (2).—*Moveables.*

(i) *Labes realis.*

**697.** The general rule of law is that though the possession of moveables presumes the property, the true proprietor cannot be deprived of his goods without his own consent by any sale or transference made to a *bona fide* purchaser or acquirer, though for full value.<sup>4</sup> Where no such consent has been given, the true proprietor is entitled to vindicate his property from the purchaser, leaving him to seek his remedy against the seller, founding on the warranty of title implied in the sale.<sup>5</sup> Thus, if the goods have been found or stolen by the seller,<sup>6</sup> or sold in violation of a contract of hiring<sup>7</sup> or in breach of trust or pledge,<sup>8</sup> or have been obtained by him through a contract extracted from the true proprietor by force or fear or vitiated by essential error, a *labes realis* inures in them, and no amount of *bona fides* or onerosity will entitle the purchaser to retain them in a question with the true proprietor.<sup>9</sup> Similarly where the seller has acquired them from a proprietor who is legally incapable of giving his consent to the transaction by which the goods are transferred to the seller, *e.g.* from a lunatic or a pupil or a minor with curators contracting without their consent.<sup>10</sup>

**698.** But the right of the proprietor is a mere *rei vindicatio*, and if the purchaser has *in bona fide* parted with the goods the proprietor has no claim against him, except in so far as he may have been *lucratus* by

<sup>1</sup> *Lang v. Dixon*, June 29, 1813, F.C. ; *Marshall v. Hynd*, 1828, 6 S. 384 ; *Stodart v., Dalzell*, 1876, 4 R. 236 ; *Magistrates of Airdrie v. Smith*, 1850, 12 D. 1222.

<sup>2</sup> *Petrie v. Forsyth*, 1874, 2 R. 214.

<sup>3</sup> *Glasgow Fearing and Building Co. v. Watson's Trs.*, 1887, 14 R. 610.

<sup>4</sup> More's Notes to Stair, xlviii.

<sup>5</sup> Stair, i. 7, 11 ; *Scot v. Low*, 1704, Mor. 9123.

<sup>6</sup> *Bishop of Caithness v. Fleshers in Edinburgh*, 1629, Mor. 9112 ; *Henderson v. Gibson*, 1806, Mor. App. voce Moveables ; *Cundy v. Lindsay*, 1878, 3 App. Cas. 459.

<sup>7</sup> *Wright v. Butchart*, 1662, Mor. 9112.

<sup>8</sup> *Ramsay v. Wilson*, 1666, Mor. 9113.

<sup>9</sup> Bell's Com. (M'Laren's ed.), i. 299 ; *Wardlaw v. Mackenzie*, 1859, 21 D. 940 ; *Cundy v. Lindsay*, *supra* ; *Morrisson v. Robertson*, 1908 S.C. 332.

<sup>10</sup> Bell's Com. (M'Laren's ed.), i. 128 ; *Thomson v. Pagan*, 1781, Mor. 8985.

the transaction.<sup>1</sup> A claim for damages, however, will lie against the purchaser who has parted with the goods *in mala fide*, with the fraudulent intention of disappointing the right of the true owner.<sup>2</sup>

(ii) *Possession on Voidable Contract.*

699. Where the true proprietor is capable of consent and has consented to transfer the property in the goods to the seller, a *bona fide* purchaser acquires a good title to them and is entitled to retain them in a question with the true proprietor. Such a contract, even where reducible as between the true proprietor and the seller, *e.g.* on the head of fraud or of minority and lesion,<sup>3</sup> is not void but voidable; there is no *labes realis*, but a mere *personalis exceptio*. The contract, accordingly, is valid till rescinded, and the option of the true proprietor to rescind is barred where innocent third parties have in the meantime acquired rights which would be defeated by its rescission.<sup>4</sup> Rescission takes date from the time at which the true proprietor announces to the seller his election to rescind.<sup>5</sup> Before the right of the purchaser can be reduced, the fraud, not only of the seller, but also of the purchaser, must be put in issue.<sup>6</sup> The presumption is in favour of the innocence of the purchaser, but he must acquire the goods without knowledge of anything wrong or without knowledge of such circumstances as might lead him to wish not to make further inquiry lest he should find there was something wrong.<sup>7</sup>

(iii) *Money and Negotiable Instruments.*

700. The development of commerce has introduced certain exceptions to the general right of vindication. Money, whether cash or bank-notes, is not subject to any *vitium reale*, *e.g.* theft, and it cannot be vindicated from a party taking it *in bona fide* and for value, however clear the proof of the theft may be.<sup>8</sup> The same rule applies to bills of exchange, cheques, and other negotiable instruments, and the holder of these can give a title which he himself did not possess to a *bona fide* holder for value, so that a *bona fide* onerous transferee is entitled to vindicate a negotiable security from the person from whom it has been stolen and who has accidentally reobtained possession of it.<sup>9</sup> If he has acted *in bona fide*, the negligence of the party taking a negotiable instrument does not fix him with the defective title of the

<sup>1</sup> *Stair*, i. 7, 11; *Scot v. Low*, 1704, Mor. 9123; *Walker v. Spence and Carfrae*, 1765, Mor. 12802.

<sup>2</sup> *Stair*, i. 7, 11; *Scot v. Low*, *supra*.

<sup>3</sup> *Anderson v. Spence*, 1683, Mor. 10286; *Gourlie v. Gourlie*, 1728, Mor. 10288.

<sup>4</sup> *Bell's Com.* (M'Laren's ed.), i. 309; *Wardlaw v. Mackenzie*, 1859, 21 D. 940; *Morrisson v. Robertson*, 1908 S.C. 332; *Sale of Goods Act*, 1893 (56 & 57 Vict. c. 71), s. 24.

<sup>5</sup> *Benjamin on Sale*, p. 524.

<sup>6</sup> *Forsyth v. Duncan*, 1863, 1 M. 1054.

<sup>7</sup> *Whitehorn Bros. v. Davison*, [1911] 1 K.B. 463.

<sup>8</sup> *Crawford v. Royal Bank*, 1749, M. 875; *Miller v. Race*, 1 Sm. L.C. 525.

<sup>9</sup> *London Joint Stock Bank v. Simmons*, [1892] A.C. 201; *Walker & Watson v. Sturrock*, 1897, 35 S.L.R. 26.

party passing it to him.<sup>1</sup> But to put him *in mala fide*, it is not necessary that he should have express notice of the defect in the title of the person who negotiated it. It is enough if he has knowledge or the means of knowledge to which he wilfully shuts his eyes—a suspicion in the mind of the party and the means of knowledge in his power wilfully disregarded.<sup>2</sup> “If he was . . . honestly blundering and careless and so took a bill of exchange or a bank-note when he ought not to have taken it, still he would be entitled to recover; but if the facts and circumstances are such that the jury, or whoever has to try the question, come to the conclusion that he was not honestly blundering and careless, but that he must have had a suspicion that there was something wrong and that he refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind, ‘I suspect there is something wrong, and if I ask questions and make further inquiry it will not longer be my suspecting it but my knowing it, and then I shall not be able to recover’—I think that is dishonesty.”<sup>3</sup>

(iv) *Latent Trusts.*

**701.** A further class of exceptions to the general rule comprises those cases in which a purchaser obtaining lands or goods *in bona fide* and for value from a party who has no authority to sell them may yet acquire a good title against the true proprietor.<sup>4</sup> Thus where a party holds heritable or moveable estate on a title *ex facie* absolute but in reality qualified by a latent trust, and in breach of the trust disposes of the property to a third party who takes it *in bona fide* and for value, the purchaser's title is not challengeable at the instance of the true proprietor.<sup>5</sup> Trust is not a *vitium reale*,<sup>6</sup> and if the true owner chooses to conceal his right from the public and clothes another with all the *indicia* of ownership, he is barred from challenging rights acquired by innocent third parties for onerous considerations under contracts with his fraudulent trustee.<sup>7</sup> But a trustee for general creditors, whether by voluntary conveyance or taking right under the Bankruptcy Acts, cannot plead the equities competent to a person who has acquired an interest in the trust property *in bona fide* and for onerous causes, and this rule applies both to heritable and moveable estate.<sup>7</sup>

SUBSECTION (3).—*Contracts with Agents.*

**702.** When a party enters into a contract with one whom he knows to be an agent, it is his duty to satisfy himself that the contract is

<sup>1</sup> *Bank of Bengal v. Fagan*, 1849, 7 Moore P.C. 61; *Raphael v. Bank of England*, 1855, 17 C.B. 161.

<sup>2</sup> *Raphael v. Bank of England*, *supra*.

<sup>3</sup> *Jones v. Gordon*, 1877, 2 App. Cas. 616, per Lord Blackburn.

<sup>4</sup> *London Joint Stock Bank v. Simmons*, [1892] A.C. 201.

<sup>5</sup> *Redfearn v. Somervail*, 1813, 1 Dow, 50.

<sup>6</sup> *Anderson v. Dempster*, 1702, Mor. 10213.

<sup>7</sup> *Heritable Reversionary Co. v. Millar*, 1892, 19 R. (H.L.) 43, per Lord Watson.



within the scope of the agent's authority. If it is not, no liability attaches to the principal. But a principal is bound in all cases where the agent is acting within the scope of his usual employment or has been held out to the public or to the other party as having competent authority, although in fact he has in the particular instance exceeded or violated his authority. In all such cases, where one of two innocent persons must suffer, the rule is that he must suffer who by his confidence or silence or conduct has misled the other. Accordingly, where a principal stands by and allows an innocent third party to deal with his agent, in the belief that he is a principal, the contract is binding on the principal.<sup>1</sup> Similarly the revocation of agency takes place as to third parties when it is made known to them, and not before; in questions with third parties who are justifiably ignorant of the revocation, the acts of the agent bind both himself and his principal. So, in the absence of such notice, payment to an agent of a debt due to the principal will release the debtor.<sup>2</sup>

**703.** But while, apart from circumstances raising a plea of personal bar, a principal is not bound by the actings of an agent outwith the scope of his authority, the expansion of modern commerce has led to the provision of greater safeguards for those who deal with mercantile agents. The effect of the Factors Act, 1889,<sup>3</sup> is that, as regards sale and pledge, a person who is proved to be in possession of goods as a mercantile agent with the consent of the owner has the same rights of dealing with them as if he himself were the owner, and he can give a good title in the ordinary course of business to a *bona fide* purchaser or pledgee.<sup>4</sup> The rights of such purchaser or pledgee are not affected by the existence of any custom of trade unless the custom is known to the purchaser.<sup>5</sup> But where the purchasers are partners or joint adventurers and one of them does not act *in bona fide*, the others are not protected by s. 2 of the Factors Act.<sup>6</sup>

**704.** Notice to one partner is equivalent to notice to all, and similarly notice to an agent is deemed to be notice to the principal.<sup>7</sup> In such cases the principal is held to have notice as from the time when he would have received the notice if the agent had performed his duty and taken such steps to communicate his knowledge to the principal as he ought reasonably to have taken.<sup>8</sup> But the knowledge of the agent is not imputed to the principal when the agent is party or privy to fraud, nor when the person seeking to charge the principal with notice knew that the agent intended to conceal the knowledge, nor where the knowledge is either acquired otherwise than in the course of employment or is not material to the business in respect of which the agent is

<sup>1</sup> Story on Agency, ss. 443, 444.

<sup>2</sup> *Ibid.*, s. 470.

<sup>3</sup> 52 & 53 Vict. c. 45.

<sup>4</sup> *Oppenheimer v. Attenborough & Son*, [1908] 1 K.B. 221; *Folkes v. King*, [1923] 1 K.B. 282.

<sup>5</sup> *Oppenheimer v. Attenborough & Son*, *supra*.

<sup>6</sup> *Oppenheimer v. Frazer & Wyatt*, [1907] 2 K.B. 50.

<sup>7</sup> *Mehta v. Sutton*, 1913, 30 T.L.R. 17.

<sup>8</sup> Bowstead on Agency, p. 365.



employed.<sup>1</sup> So where the same person is director of two different limited liability companies, the knowledge which has been acquired by him as the officer of one company will not be imputed to the other company unless the common officer had some duty imposed on him to communicate that knowledge to the other company, and had some duty to receive the notice imposed on him by the company alleged to be affected by the notice.<sup>2</sup>

SUBSECTION (4).—*Assignations.*

705. In personal obligations, whether contained in a unilateral deed or in a mutual contract, if the creditor's right is sold to an assignee for value, and the assignee purchases in good faith, he is, nevertheless, subject to all the exceptions and pleas pleadable against the original creditor: *Assignatus utitur jure auctoris*. This doctrine, however, does not apply to the transmission of heritable estate, nor to the sale of corporeal moveables, nor to negotiable instruments. It follows that the right of a *bona fide* onerous assignee may be affected whether the contract between the debtor and the original creditor is void or merely voidable. Accordingly, either breach of warranty or fraud on the part of the assured is a ground of reduction of a policy of life insurance even in the hands of a *bona fide* onerous assignee.<sup>3</sup>

SECTION 5.—RELATIONSHIPS IN WHICH NONA FIDES ESSENTIAL.

SUBSECTION (1).—*Insurance.*

706. All contracts are voidable on the ground of false representation, but there are certain classes of contracts in which the non-disclosure of material facts will be sufficient to avoid the contract. Insurance is a contract of this nature.<sup>4</sup> It is a contract of speculation in which the special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured alone. The utmost good faith is therefore required, and the assured is required to state not only all matters within his knowledge which he believes to be material but all which in point of fact are so. If he conceals anything which he knows to be material, it is fraud; and even if the suppression should happen through ignorance or mistake, without any fraudulent intention, such concealment is equivalent to a false representation vitiating the policy.<sup>5</sup> This rule is of peculiar importance in marine insurance, but it is also applied to life and guarantee policies and to fire, burglary, and accident insurance.<sup>6</sup> The *onus* is on the insurer to prove that the representation was not only false, but that it was material

<sup>1</sup> Bowstead on Agency, p. 366.    <sup>2</sup> *In re David Payne & Co., Ltd.*, [1904] 2 Ch. 608.

<sup>3</sup> *Scottish Widows' Fund v. Buist*, 1876, 3 R. 1078.

<sup>4</sup> Macgillivray on Insurance, p. 269.

<sup>5</sup> *Carter v. Boehm*, 1766, 3 Burr. 1905; *Dalglish v. Jarvie*, 1850, 2 Mac. & G. 231.

<sup>6</sup> *London Assurance v. Mansel*, 1879, 11 Ch. D. 363; *Jock v. Law Union and Crown Insurance Co.*, [1908] 2 K.B. 431.

and induced the risk. But where the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality; the only question is whether or not the statement is in accordance with the fact.<sup>1</sup>

#### SUBSECTION (2).—*Cautionary Obligations.*

**707.** The rule that all material circumstances known to the assured must be disclosed is peculiar to insurance, and does not extend to contracts of guarantee.<sup>2</sup> The creditor, however, is bound to act *in bona fide*, and if there are facts within his knowledge which he is in point of law bound to divulge, non-disclosure of these facts, whether intentional or not, invalidates the contract.<sup>3</sup> The creditor is under a duty of disclosure where “there is anything that might not naturally be expected to take place between the parties who are concerned in the transaction,”<sup>4</sup> and failure to disclose is held equivalent to an implied representation that the unusual circumstance did not exist.<sup>5</sup> Thus, if the creditor takes a bond of caution for the actings of an agent, knowing or having ground to believe that he is dishonest, he holds out the agent as trustworthy, and the contract based on this false representation is not binding on the cautioner.<sup>6</sup> After the contract of cautionry has been entered into, the cautioner is entitled to withdraw his guarantee for the future on discovering the agent to be guilty of dishonesty,<sup>7</sup> and if the creditor, discovering an act of dishonesty on the part of the agent, fails to communicate his knowledge to the cautioner, this concealment liberates the cautioner from liability for the future acts of the agent.<sup>8</sup>

**708.** Where no duty of disclosure exists and the creditor, whether ultroneously or in reply to questions, makes certain representations, they must be full and fair.<sup>9</sup> Suretyship is a contract in which very little said which ought not to have been said, and very little not said which ought to have been said, is sufficient to prevent the contract from being valid;<sup>10</sup> and if the creditor conceals any fact which obviously or materially affects the risk, and, much more, if, even from carelessness, he misrepresents the facts and misleads the cautioner, the contract is invalid.<sup>11</sup>

#### SUBSECTION (3).—*Agency.*

**709.** The relationship of principal and agent is one in which the principal bargains for the exercise of the disinterested skill, diligence,

<sup>1</sup> *Newcastle Fire Insurance Co. v. Macmorran*, 1815, 3 Dow, 255; *Anderson v. Fitzgerald*, 1853, 4 H.L.C. 484; *Standard Life Assurance Co. v. Weems*, 1884, 11 R. (H.L.) 48.

<sup>2</sup> *Lee v. Jones*, 1864, 34 L.J.C.P. 131, per Lord Blackburn at p. 134.

<sup>3</sup> *Smith v. Bank of Scotland*, 1813, 1 Dow, 272; *Railton v. Matthews*, 1844, 3 Bell's App. 56.

<sup>4</sup> *Hamilton v. Watson*, 1845, Bell's App. 67.

<sup>5</sup> *Lee v. Jones*, *supra*.

<sup>6</sup> *Smith v. Bank of Scotland*, 1813, 1 Dow, 272.

<sup>7</sup> *French v. Cameron*, 1893, 20 R. 966.

<sup>8</sup> *Phillips v. Foxall*, 1872, L.R. 7 Q.B. 666.

<sup>9</sup> *Stone v. Compton*, 1838, 5 Bing. N.C. 142.

<sup>10</sup> *Davies v. London and Provincial Marine Insurance Co.*, 1878, 8 Ch. D. 469.

<sup>11</sup> *British Guarantee Association v. Western Bank*, 1853, 15 D. 834.

and zeal of the agent for his own exclusive benefit.<sup>1</sup> Good faith requires that, in matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. A bargain of that nature is voidable at the option of the principal whether any advantage has in fact accrued to the agent or not. Thus an agent employed to sell cannot himself become the purchaser, and an agent employed to buy cannot become the seller. Nor can an agent for the seller become the agent of the purchaser in the same transaction.<sup>2</sup> Trustees, tutors, partners, and company directors all occupy a fiduciary position with relation to those whose interests are their charge, and the same rules apply to them as to agents.

#### SUBSECTION (4).—*Partnership.*

**710.** The relation between partners and the firm of which they are members being one of agency, they are bound by the general rules which apply to agents.<sup>3</sup> The utmost good faith is due from each member of a partnership towards every other. No partner may obtain a private advantage at the expense of the firm without the full knowledge and consent of his partners, either by directly making a profit out of them or by appropriating to himself benefits which he ought to have acquired, if at all, for the common advantage of the firm. Where any dispute arises as to the conduct of a partner he will be required to shew not only that he has law on his side, but that his conduct will bear to be tried by the highest standards of honour.

**711.** The obligation as to good faith applies also to parties negotiating for partnership and to those who have dissolved partnership but have not wound up, especially where one partner is trying to get rid of another or to buy him out.<sup>4</sup> Thus where two partners obtained renewal of a lease in their own names, then dissolved partnership, and sought to exclude their co-partner, the lease was held to be part of the assets of the firm in the accounting to which he was entitled.<sup>5</sup>

**712.** Similarly, the powers of a majority of partners must be exercised in good faith. "All the partners must be consulted, and the majority must act *in bona fide*, meeting not for the purpose of negativing what any one may have to offer but for the purpose of negativing what, when they are met together, they may, after due consideration, think proper to negative. For a majority to say, 'We do not care what one partner may say; we being the majority will do what we please,' is not allowed."<sup>6</sup>

**713.** No majority can expel a partner unless they have express power to do so,<sup>7</sup> but if the power is exercised *in bona fide* the Court

<sup>1</sup> Story on Agency, s. 210.

<sup>2</sup> *Ibid.*, s. 211 and note.

<sup>3</sup> *Cassels v. Stewart*, 1881, 6 App. Cas. 64, per Lord Blackburn.

<sup>4</sup> Lindley on Partnership, pp. 389, 390.

<sup>5</sup> *Featherstonhaugh v. Fenwick*, 1810, 17 Ves. 298.

<sup>6</sup> *Const v. Harris*, 1824, Turn. & Ry. 525, per Lord Chancellor Eldon.

<sup>7</sup> Partnership Act, s. 25.



cannot intervene. All such powers, however, are construed strictly, and the Court will not allow expulsion if it is shewn that the co-partners, though justified by the wording of the partnership agreement, have in fact taken advantage of it from oblique motives. Thus, where a majority consisting of two-thirds of the partners wished to expel a partner, they having the right to buy up his share at valuation, it was held that they had no right to expel him merely for the purpose of acquiring his share; that was not a *bona fide* exercise of their powers, since forfeiture of the share was intended to be the consequence, not the motive, of the expulsion.<sup>1</sup> This rule does not apply in a case where a single partner has a power of expulsion in terms which shew that he may exercise his discretion capriciously.<sup>2</sup>

## SECTION 6.—BONA FIDES AS A DEFENCE TO ACTIONS FOR DAMAGES.

### SUBSECTION (1).—General.

714. *Bona fides* may be an element in the defence against certain classes of claims. Where a party undertakes to do an act as the agent of another, he is personally liable if he has no authority to do the act. This applies in cases of fraudulent misrepresentation and also where the agent, knowing that he has no authority, nevertheless undertakes to act for the principal, though he intends no fraud. But if unknown to both parties his authority is revoked by the death of the principal, an agent acting *in bona fide* is not liable.<sup>3</sup>

### SUBSECTION (2).—Company Directors.

715. Under s. 279 of the Companies Act, 1908,<sup>4</sup> directors of companies may be relieved from negligence or breach of trust if they have acted honestly and reasonably, and ought to be excused. This section extends to transactions which are wholly *ultra vires* of the company, but which the directors, acting on counsel's opinion, honestly and reasonably thought to be *intra vires*.<sup>5</sup> Apart from this section, when a director acts *ultra vires*, i.e. not only beyond his own powers but also beyond any power the company can confer on him, it is no defence that he acted *in bona fide* and with the approval of the majority of the shareholders.

716. Directors are personally liable for statements appearing in the prospectus, if the allottee proves that material statements appearing in the prospectus are untrue, that he took the shares on the faith of the prospectus, and that he sustained damage. To escape liability the director must prove affirmatively that he had reasonable grounds to believe the statements to be true, and that he did in fact believe them to be true, or, as an alternative, he must prove that the statement, if

<sup>1</sup> *Blisset v. Daniel*, 1853, 10 Hare, 493.    <sup>2</sup> *Russell v. Russell*, 1880, 14 Ch. D. 471.

<sup>3</sup> Story on Agency.

<sup>4</sup> 8 Edw. VII. c. 69.

<sup>5</sup> *In re Claridge's Patent Asphalte Co., Ltd.*, [1921] 1 Ch. 543.



made on the authority of an expert, was, in fact, made on the authority of such an expert and fairly represented his opinion.

SUBSECTION (3).—*Trustees.*

717. A trustee may be relieved from personal liability for any breach of trust, if it appears to the Court that the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of trust.<sup>1</sup> Mere *bona fides*, however, will not protect the trustee if he has not acted reasonably.<sup>2</sup> But, in the case of a public charitable trust, *bona fides* will protect trustees. The Court will deal strictly with any wilful misapplication of funds, but where the administration of the funds, though mistaken, has been honest and unconnected with any corrupt purpose, the Court, while it directs for the future, refuses to visit with punishment what has been done in the past.<sup>3</sup>

718. Trustees who act in good faith, even where they have made an illegal or irregular use of trust funds, will not be removed from office by the Court. Before the Court will remove a trustee there must have been a decided malversation of office, something beyond a mere irregularity or illegality such as the payment by a trustee out of trust funds of a claim not properly vouched.<sup>4</sup>

SUBSECTION (4).—*Slander.*

719. A person who inflicts an injury on another in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. Malice may, therefore, be imputed to him although, so far as the state of his mind is concerned, he acts ignorantly and in that sense innocently.<sup>5</sup> *Bona fides*, therefore, is in general no defence to an action for slander, since malice, which is of the essence of the charge, is presumed from defamatory words. Privilege, however, destroys that presumption, and where a case of privilege is disclosed malice is no longer inferred from the mere wrongful act, but the pursuer must aver facts and circumstances out of which malice may be inferred.<sup>6</sup> But no protection is afforded to a person who wrongly assumes the facts which constitute a privileged occasion, for no person can, even with the best of good faith, assume relationships which do not in fact exist, or think that he possesses duties which the real facts of the case shew were no duties at all.<sup>7</sup>

<sup>1</sup> Trusts (Scotland) Act, 1921 (11 & 12 Geo. V. c. 58), s. 32.

<sup>2</sup> *Clarke v. Clarke's Trs.*, 1925, S.L.T. 498.

<sup>3</sup> *Andrews v. Ewart's Trs.*, 1886, 13 R. (H.L.) 69.

<sup>4</sup> *Gilchrist's Trs. v. Dick*, 1883, 11 R. 22; *Harris v. Howie's Trs.*, 1893, 21 R. 16.

<sup>5</sup> *Shields v. Shearer*, 1914 S.C. (H.L.) 33, per L.C. Haldane.

<sup>6</sup> *Adam v. Ward*, [1917] A.C. 309, per Lord Dunedin; *Shields v. Shearer*, 1914 S.C. (H.L.) 33.

<sup>7</sup> *James v. Baird*, 1916 S.C. (H.L.) 158, per L.C. Buckmaster.

SUBSECTION (5).—*Giving Information to the Police.*

**720.** In this type of case the innocence of the pursuer is presumed, but the *onus* is on him to prove (1) that there was want of reasonable and probable cause for the prosecution, and (2) that the proceedings of which he complains were initiated in a malicious spirit—that is, from an indirect or improper motive and not in furtherance of justice. A man has probable cause if in giving the information to the police he is acting in the way a reasonable man would act having regard to the state of his knowledge at the time the information is given.<sup>1</sup>

SUBSECTION (6).—*Abuse of Process—Wrongous Use of Diligence.*

**721.** A litigant using any legal right or remedy to which he is absolutely entitled, and which requires no special warrant, *e.g.* raising an action or arresting on the dependence, cannot be made liable for the consequence of its use unless he is shewn to have used it maliciously and without probable cause.<sup>2</sup> But in the case of remedies which can only be obtained on *ex parte* application and on the strength of *ex parte* statements, *e.g.* interim interdicts, the applicant is answerable for the truth of the statement on the faith of which he obtained his warrant. That the statement was made in good faith is no defence if it was inconsistent with fact. Such a process is employed *periculo petentis*, and the mere want of success will shew that the use was wrongous. And even in the case of diligence following on the ordinary course of process, a litigant may be made liable if there is some flaw in the steps of process and if in spite of it diligence is persisted in.<sup>3</sup> See ABUSE OF CIVIL PROCESS.

## SECTION 7.—BONA FIDES AS AFFECTING QUESTIONS OF STATUS.

SUBSECTION (1).—*Marriage.*

**722.** A marriage to which some legal impediment exists is not validated by the *bona fides* of the parties to it. But the *bona fides* of one of the parties alone has the effect of legitimating the children of the union conceived while the existence of the impediment was unknown.<sup>4</sup> In such circumstances, since the presumption is that children of an unlawful marriage are illegitimate, the *onus* of proving *bona fides* is on the party pleading legitimacy. There appears to be no reason in principle for confining the application of this equitable doctrine to the issue of marriages which have been entered into publicly and after due

<sup>1</sup> *Mills v. Kelvin & White, Ltd.*, 1913 S.C. 521.

<sup>2</sup> *Wolthecker v. Northern Agricultural Co.*, 1862, 1 M. 211.

<sup>3</sup> *Wolthecker, supra*; *M'Gregor v. M'Laughlin*, 1906, 8 F. 70.

<sup>4</sup> *Craig, Jus Feudale*, 2, 18, 18; *Fraser, H. & W.*, i. 151; *Peek v. Peek*, 1926 S.C. 565.

proclamation of banns. But *bona fides* will be more readily inferred where the marriage is regular than where it is clandestine.<sup>1</sup>

**723.** The error under which the innocent party laboured must have been *justus error*, i.e. there must have been such circumstances as plainly to shew that the innocent party had no reasonable cause of suspicion.<sup>2</sup> Mere absence can never establish a presumption of death founding *bona fides* unless it be for a very considerable period of years combined with other circumstances of probability.<sup>3</sup> Generally the error must be one of fact and not of law.<sup>4</sup> In a case of marriage within the forbidden degrees, where the facts were known but the parties *in bona fide* thought themselves entitled to marry, it was stated by five of the judges that on the question whether the child of the pretended marriage could make a claim founded on the supposed *bona fides* of the parents it was theoretically impossible to admit that anyone could be *in bona fide* in violating the positive prescriptions of the statute law or that any civil rights could flow from such a violation. Everyone was bound to know as much of the law as was necessary to regulate his conduct in the ordinary relations of life, and it could not be said that there was a popular sentiment or opinion that such marriages were legal which might have induced the parties to think that they were not disobeying the law when they entered into the marriage.<sup>5</sup> But the judgment appears to recognise that in certain circumstances an error in law might afford ground for the *bona fide* belief that there was no impediment to the marriage.

**724.** The parent who was *in mala fide* has no parental rights over the children and cannot succeed to their property.<sup>6</sup> As regards the property rights of the parties to the union, Lord Fraser was of opinion that the spouse *in bona fide* acquired the same patrimonial rights in the estate of the other as if no impediment had existed, but Stair says: "All things return *hinc inde*."<sup>7</sup>

#### SUBSECTION (2).—*Bigamy.*

**725.** *Bona fides* is a good defence to the charge of bigamy. It completely negatives the element of *dolus malus* essential to the nature of a crime.<sup>8</sup> Substantial grounds for the belief must be proved by the panel.<sup>9</sup> But a greater readiness will be shewn to infer *bona fides* in a criminal charge than where civil rights are concerned.<sup>10</sup>

<sup>1</sup> Bankton, i. 5, 51; Fraser, H. & W., i. 33 and note; *Petrie v. Ross*, 1896, 4 S.L.T. 63.

<sup>2</sup> Bell's Report of a Putative Marriage; *Lapsley v. Grierson*, 1845, 8 D. 34, affd. 1 Cl. & Fin. (N.S.) 498.

<sup>3</sup> *Lapsley v. Grierson*, *supra*.

<sup>5</sup> *Purves' Trs. v. Purves*, 1895, 22 R. 513.

<sup>4</sup> Fraser, H. & W., i. 34.

<sup>6</sup> Fraser, H. & W., i. 152.

<sup>7</sup> Stair, i. 4, 20; see *Earl of Eglinton v. Countess*, 1610, Mor. 6185; *Bird v. Bird*, 1754, 1 Lee, 622; *Wright v. Sharp*, 1880, 7 R. 460.

<sup>8</sup> Hume, i. 461; Alison, i. 539; Macdonald, 201.

<sup>9</sup> Hume, i. 461.

<sup>10</sup> *Lapsley v. Grierson*, 1845, 8 D. 34, per Lord Moncreiff at p. 59.



## SECTION 8.—BONA FIDES AND STATUTORY POWERS.

**726.** When a corporation or public body, such as a public company, education authority, or Government Department, is entrusted with the exercise of certain statutory powers, it must exercise these powers *in bona fide*.<sup>1</sup> A public body may not transcend the limits of the authority conferred upon it, and no public body can be regarded as having statutory authority to act in bad faith or from corrupt or improper motives.<sup>2</sup> If a public body is shewn to have exercised its powers in bad faith, the Court may intervene and declare such an act to be *ultra vires* and inoperative.<sup>3</sup>

**727.** The duty of supervision on the part of the Court will be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at.<sup>4</sup> But the public body in the exercise of its discretion must not take into account extraneous or irrelevant considerations,<sup>5</sup> for if people who have to discharge a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.<sup>6</sup> Reasonableness in the exercise of the discretion may be an essential element of *bona fides*. "Persons who hold public office have a legal responsibility towards those whom they represent—not merely to those who vote for them—to the discharge of which they must honestly apply their minds. *Bona fides* here cannot simply mean that they are not making a profit out of their office or acting in it from private spite, nor is *bona fides* a short way of saying that the council has acted within the ambit of its powers and therefore not contrary to law. It must mean that they are giving their minds to the comprehension and their wills to the discharge of their duty towards that public whose money and local business they administer."<sup>7</sup> Accordingly, where a borough council which had power to allow such wages as it might think fit, being of opinion that £4 a week was the least wage which a local authority as a model employer ought to pay for adult labour, paid its lowest grade of workers £4 a week without regard to the fall in the cost of living or to existing labour conditions, it was held that the discretion conferred on the borough council had not been exercised.<sup>7</sup> Pecuniary interest in

<sup>1</sup> *Rex v. Board of Education*, [1910] 2 K.B. 165.

<sup>2</sup> *Stockton and Darlington Rly. Co. v. Brown*, 1861, 9 H.L. 246; *Short v. Poole Corporation*, 1925, T.L.R. 107.

<sup>3</sup> *Short v. Poole Corporation*, *supra*.

<sup>4</sup> *Re Beloved Wilkes Charity*, 1851, 3 Mac. & G. 440, 448.

<sup>5</sup> *Re Beloved Wilkes Charity*, *supra*; *Rex v. Archbishop of Canterbury*, 1812, 15 East, 117, per Lord Ellenborough; *Rex v. Bishop of London*, 1811, 13 East, 419; *Hayman v. Governors of Rugby School*, 1874, L.R. 18 Eq. 28; *Stockton and Darlington Rly. Co. v. Brown*, 1861, 9 H.L. 246; *Rex v. Board of Education*, [1910] 2 K.B. 165.

<sup>6</sup> *Reg. v. Vestry of St. Pancras*, 1890, 24 Q.B.D. 371, per Esher M.R.

<sup>7</sup> *Roberts v. Hopwood*, [1925] A.C. 578, per Lord Sumner.



the members of the public body would be conclusive evidence of bad faith, but circumstances which may be calculated to produce bias will not disqualify where there is no ground for doubting the *bona fides* of those exercising the discretion.<sup>1</sup>

**728.** Where a corporation has power to make by-laws the Court may declare them invalid if they are unreasonable in the sense that they are found to be partial and irregular in their operation between different classes, if they are manifestly unjust, if they disclose bad faith, or if they involve such oppressive and gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men.<sup>2</sup> See BY-LAW.

**729.** On the same principle, when statutory provision is made for compensating parties affected by the operations of a corporation or public body, claims for compensation must be genuine and made *in bona fide*. Thus, if under s. 78 of the Railways Clauses Act, 1845,<sup>3</sup> the owner of minerals gives notice of his intention to work them, the notice must not be given in order to raise up a fictitious claim; <sup>4</sup> but to justify the owner in giving notice it is not necessary that he should intend to work the minerals himself, if he has a real and *bona fide* desire to work them either by himself or by his lessees or licensees.<sup>5</sup>

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<sup>1</sup> *Hayman v. Governors of Rugby School, supra.*

<sup>2</sup> *Kruse v. Johnson*, [1898] 2 Q.B. 91, per Lord Russell of Killowen.

<sup>3</sup> 8 & 9 Vict. c. 33.

<sup>4</sup> *Glasgow and South-Western Railway Co. v. Bain*, 1893, 21 R. 134.

<sup>5</sup> *Midland Railway Co. v. Robinson*, 1889, 15 App. Cas. 19.

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## BONA VACANTIA.

*See* LAST HEIR.

# BOND.

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## INTRODUCTION.

**730.** Bond is the name used to describe the deed (or clause or clauses in a deed) by which an obligation is undertaken. The obligation may be of any kind, as to pay, or to do, or to abstain from doing. These distinctions may seem sufficiently clear and obvious; but in point of fact and law it is sometimes a difficult question, and one attended with important consequences, to determine whether the legal nature of the obligation is to pay or to perform. The circumstances in which an obligation to pay money may be incurred are various. A few of the most outstanding cases are: obligations for repayment of borrowed money, which may be the obligant's own debt, or truly the debt of a third party; for indemnity by such third party—the true debtor—to the person so interposing his credit; for payment of family provisions, and for payment of annual or other periodical sum for a life or lives or other term. These obligations are respectively embodied in ordinary personal bonds, bonds of caution, bonds of relief, bonds of provision, and bonds of annuity. See CAUTIONARY OBLIGATIONS; RELIEF; ANNUITIES.

## SECTION 1.—PERSONAL BOND.

**731.** The ordinary form of a personal bond is familiar, but there are many practical details which require attention, and which may necessitate alterations in particular cases. Thus the money may have been advanced some time before, or the bond may be not for borrowed money in the ordinary sense, but for money due on an accounting, or it may be intended that the money should not be payable till after a period of years; in each case the necessary alterations on the style will be briefly made, so as to have a correct statement of the facts and of the contract.

SUBSECTION (1).—*Payee.*

**732.** According to inveterate practice in all ordinary cases the lender or payee is named and designed in the bond. On the question of the validity of bonds to bearer see *NEGOTIABLE INSTRUMENTS*; *STOCK EXCHANGE*. In the case of companies registered under the Companies Acts, debentures and debenture stock to bearer issued in Scotland are declared to be valid and binding notwithstanding the Scots Act 1696, c. 25.<sup>1</sup>

SUBSECTION (2).—*Interest.*

**733.** The precise rate should be specified, and this is essential for summary diligence or heritable security,<sup>2</sup> but “legal interest” will usually be interpreted as 5 per cent.<sup>3</sup> It has been laid down that there can be no valid obligation for compound interest.<sup>4</sup> The Act<sup>5</sup> founded on by Erskine is repealed, and it is difficult to see any ground for the dictum. It is undoubted that accumulation may be expressly agreed to by the creditor under a bond of corroboration as regards arrears existing at that date;<sup>6</sup> the Act 1 & 2 Vict. c. 114 (ss. 5 and 10) provides machinery for reaching the same result from time to time without the debtor’s consent; and see the express terms of the judgment of the Court in *Molleson v. Hutchison*.<sup>7</sup>

SUBSECTION (3).—*Penalty.*

**734.** The penalty covers only actual expense, loss, and damage incurred by the creditor through the debtor’s default. As to the expenses which are included, see the cases cited.<sup>8</sup> Even if liability for the expenses which are covered by the penalty clause could be established otherwise, as by a separate action, still the presence of the clause in the bond has

<sup>1</sup> Companies (Consolidation) Act, 1908, 8 Edw. VII. c. 69, s. 106.

<sup>2</sup> *Alston v. Nellfield Co.*, 1915 S.C. 912.

<sup>3</sup> *Kinloch, Petr.*, 1920, 2 S.L.T. 79.

<sup>4</sup> Ersk. iii. 3, 81; Bell, Convey. 256.

<sup>5</sup> 1621, c. 28.

<sup>6</sup> Bell, Convey., *supra*.

<sup>7</sup> 1892, 19 R. 581.

<sup>8</sup> *Gordon v. Maitland*, 1761, Mor. 10050; *Young v. Sinclair*, 1796, Mor. 10053; and *Bruce v. Scottish Amicable Life Assurance Soc.*, 1907 S.C. 637.

the advantage of giving the creditor the benefit of any security constituted by the bond for the expenses, as well as for principal and interest, and in the same place in the ranking.<sup>1</sup> The usual form of personal bond does not include an obligation for expenses; this appears to be an omission, and, if wished, an express clause can be added.

#### SUBSECTION (4).—*Repayment.*

**735.** In the absence of agreement to the contrary, the debtor under a personal bond is entitled to repay the loan at any time after the term of payment without notice; and in like manner the creditor can call it up at any time after the term of payment, giving the usual charge for payment, or proceeding by action if the bond should contain no consent to registration for execution. When a fixed endurance has been agreed to on both sides, the debtor cannot insist on making repayment, against the will of the creditor, otherwise than in terms of the agreement, any more than the creditor can in such a case force payment before the agreed-on term.<sup>2</sup> By s. 103 of the Companies Act, 1908, debenture bonds or stock of a company incorporated under the Companies Acts may be made irredeemable, or redeemable only on the happening of a contingency, however remote, or on the expiration of a period, however long. The place fixed for repayment regulates the liability for remitting charges.

#### SUBSECTION (5).—*Creditor's Succession.*

**736.** Originally all bonds with a clause of interest were heritable after the first term of payment of interest, as were bonds where the term of payment of principal was distant, or uncertain, with interest running in the meantime. The test is the *interest*. Thus a bond without a clause of interest was always moveable.<sup>3</sup> And no matter whether the first term of payment of interest was earlier or later than, or simultaneous with, the term of payment of principal, the bond remained moveable until the first term of payment of interest had arrived.<sup>4</sup> Again, while a bond with a distant or uncertain term of payment of principal was heritable from the first if it bore interest,<sup>5</sup> such a bond remained moveable if it bore no interest until the distant or uncertain date. The case of *Gray v. Walker*<sup>6</sup> is an instance of a bond of this latter kind; it was payable on the death of a third party, until whose death it bore no interest; and accordingly it was found to be moveable.

**737.** This state of the law was altered by two Acts<sup>7</sup> passed in 1641 and 1661. They did not touch (1) bonds with heritable security, or (2)

<sup>1</sup> *Jameson v. Beilby*, 1835, 13 S. 865.

<sup>2</sup> *Ashburton v. Escombe*, 1892, 20 R. 187.

<sup>3</sup> *Ersk. ii. 2, 9.*

<sup>4</sup> *Barclays v. Pearson*, 1682, Mor. 5777; *Gray v. Walker*, 1859, 21 D. 709; *Downie v. Downie's Trs.*, 1866, 4 M. 1067. But see a suggestion to the contrary in *Bennett's Exrs. v. Bennett's Exrs.*, 1907 S.C. 598.

<sup>5</sup> *Gray v. Gordon*, 1666, Mor. 3629.

<sup>6</sup> 1859, 21 D. 709.

<sup>7</sup> 1641, c. 57; 1661, c. 32.



bonds excluding executors. Other bonds were thereby declared moveable except as regards—

1. The fisk ; this prevents the bonds falling to the Exchequer under the single escheat.

2. The rights of husband and wife : *i.e.* (1) *jus mariti*, (2) right of administration, (3) *jus relictæ*, and (4) *jus relictæ*. The result was that Scottish debentures, for example, were made moveable from the beginning, and at all times as regards children, but after the first term of payment of interest they became heritable as regards the widow, so that they contributed to legitim but not to *jus relictæ* or (later) *jus relictæ*. This is altered by the Conveyancing Act, 1924,<sup>1</sup> and bonds in that position (without heritable security and not excluding executors) are wholly moveable in the succession of anyone dying after 31st December 1924.

**738.** Bonds excluding executors are in a peculiar position. The Act of 1661 declares that they are “to be heritable and to pertain to the heir.” It has been doubted whether this makes them heritable as regards the rights of husband and wife, but it is difficult to see how any other conclusion could be reached. That is to say, they still do not contribute to either *jus relictæ* or legitim. They continue heritable in the person of the heir of the original creditor.<sup>2</sup> But it is another question whether, if such a bond is assigned without repeating the exclusion of executors, it thereby becomes moveable in the new creditor, or remains heritable. If it were assigned to the new creditor “and his executors,” it would be rendered moveable ; and the same would result if the new destination were to him “and his heirs and executors.”<sup>3</sup> But if it were assigned to the new creditor simply, or to him “and his heirs,” there would be room for question.<sup>4</sup> The exclusion of executors is applicable only to the executors of the original creditor, and it would seem to follow that in the succession of the new creditor there is no exclusion of executors, and therefore that the bond is moveable. That is the rule recognised in the case of heritable securities.<sup>5</sup> Personal bonds excluding executors are sometimes resorted to in order to defeat legal rights.

**739.** Without an express exclusion of executors, a bond may be made heritable *destinatione*, as by taking it to the creditor and his heir in heritage, or his heir of line or nearest heir-male. But a destination to heirs of the body has not that effect.<sup>6</sup> That follows from the consideration that a destination to “heirs” leaves the bond personal, and the addition of the words “of the body” merely limits the selection within the same class, *i.e.* personal representatives. It is common to find

<sup>1</sup> 14 & 15 Geo. V. c. 27, s. 22.

<sup>2</sup> *Mackay v. Robertson*, 1725, Mor. 3224.

<sup>3</sup> *Sandilands v. Sandilands*, 1680, Mor. 5498.

<sup>4</sup> *Kennedy v. Kennedy*, 1747, Mor. 5499 ; Ersk. ii. 2, 12.

<sup>5</sup> Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101), s. 117. See *Ross v. Ross's Trs.*, 4th July 1809, F.C.

<sup>6</sup> *Duffs v. Duff*, 1745, Mor. 5429.

the obligation running in favour of "heirs, executors, and assignees"; but "executors and assignees" is both shorter and more correct.

740. Even where bonds are heritable altogether or to certain effects, the interest to date of death or other event in question is moveable.<sup>1</sup>

#### SUBSECTION (6).—*Debtor's Succession.*

741. Even though the bond does not contain a renunciation of the benefit of discussion, the creditor has right of action against the successors in both the personal and heritable estates, and he can proceed against the latter in the first instance; but whether he do so first or not, he must observe a certain order in attacking the successors in the heritable estate. The order is: <sup>2</sup> (1) the heir specially bound or taking the property relative to which the obligation is granted; (2) the heir of line; (3) the heir male; (4) other heirs of provision; and of these apparently the heir of a marriage is liable last. The difference resulting from a renunciation of the benefit of discussion is, that not only may the creditor attack the heritable successors before he sues the personal representatives (as he always may), but he may take the former in any order he pleases. The opinion has been expressed that an obligation on "heirs and executors jointly and severally" imports an exclusion of the right of discussion.<sup>3</sup>

742. Although a bond may be heritable in the creditor's succession, it does not follow that it is heritable in the debtor's succession also. Thus there is no authority for holding that a bond excluding executors is heritable in the debtor's succession. The distinction is obvious, for the creditor has power and control over the destination, and the debtor has not. The converse case of heritable securities is in point; these are moveable in the creditor's succession, but heritable in that of the debtor. But, as regards *jus relictæ* and *jus relictī*, bonds which, if due to the deceased spouse, would not increase the survivor's share, are not to be reckoned against the survivor if due by the estate.<sup>4</sup> As to questions between creditors under bonds on the one hand, and legatees and other beneficial successors on the other, and the duties and liabilities of the debtor's trustees in that connection, see the cases cited.<sup>5</sup>

#### SUBSECTION (7).—*Variations in Form and Effect.*

743. Variations in the form and effect of bonds arise from the number or quality of the parties by and to whom they are granted. Amongst others the following may be referred to, namely, bonds by (1) two or more persons, (2) principal and cautioner, or (3) trustees

<sup>1</sup> 1661, c. 32.

<sup>2</sup> Bell, Prin., s. 1935; M'Laren, Wills, 1320; Bell, Convey. 247, and cases cited.

<sup>3</sup> Lord Watson in *Burns v. Martin*, 1887, 14 R. (H.L.) 20.

<sup>4</sup> *Ross v. Graham*, 14th November 1816, F.C.; Fraser, Husband and Wife, 980; Conveyancing Act, 1924 (14 & 15 Geo. V. c. 27), s. 22 (2).

<sup>5</sup> *St. Andrews Mags. v. Forbes*, 1893, 31 S.L.R. 225, and cases cited; *Heritable Securities Assoc. v. Miller's Trs.*, 1893, 20 R. 675.

or others in a fiduciary capacity; and bonds to (1) trustees, etc., or (2) two persons in liferent and fee.

(i) *Two or More Obligants.*

744. In the case of bonds with two or more obligants, the principal point to be observed is whether they are to be liable *in solidum* or only *pro rata*. If it be intended that the obligants should be liable *in solidum*, the proper expression is "jointly and severally"; but the same result follows from "severally," or "all as full debtors," or in the case of partners, or of obligations *ad factum præstandum*. The effect of "conjunctly" is doubtful.<sup>1</sup> Principal and cautioner also are jointly and severally liable.<sup>2</sup> The obligants in such bonds may be freed if the creditor gives time to one without the consent of others or parts with securities. For other specialties in bonds of caution, see CAUTIONARY OBLIGATIONS.

745. The Bankruptcy Act, 1913,<sup>3</sup> provides that when one of the obligants is bankrupt, the creditor does not release a co-obligant by drawing a dividend from the estate of the bankrupt, and consenting to a discharge or to any composition. This, however, does not expressly meet the case of private arrangements, and it is common to insert special clauses dealing with these and similar matters, as well as with the case of any of the obligants not signing, or of some of the signatures not being genuine.

(ii) *Bonds by Trustees.*

746. As regards bonds by trustees, the important points are the trustees' power to borrow and whether they are or are not to be personally liable. As to the former question, see the Trusts (Scotland) Act, 1921<sup>4</sup> (s. 4). If personal liability be not intended, the bond ought to be framed so that the granters bind themselves "only as trustees fore-said, and not personally or individually," and the consent to registration ought to be for execution against the granters in the same qualified terms.<sup>5</sup> But in any case the trustees will be liable if they part with the trust estate without making proper provision for the debt.<sup>6</sup> All the trustees ought to sign the bond.<sup>7</sup>

(iii) *Bonds to Trustees.*

747. In bonds to trustees, the obligation ought to run in favour of the named trustees "and the survivors and survivor of them." A clause is sometimes inserted to the effect that neither the debtor nor any

<sup>1</sup> Bell, Prin., ss. 54-61, and cases cited.

<sup>2</sup> *Grant v. Strachan*, 1721, Mor. 14633; Bell, Prin., s. 245.

<sup>3</sup> 3 & 4 Geo. V. c. 20, s. 52.

<sup>4</sup> 11 & 12 Geo. V. c. 58.

<sup>5</sup> *McLaren*, Wills, 1334, 1339.

<sup>6</sup> *Thomson v. M'Lachlan's Trs.*, 1829, 7 S. 787; *Heritable Securities Assoc. v. Miller's Trs.*, 1893, 20 R. 675.

<sup>7</sup> *Scott v. Reid*, 1822, 1 S. (332), 308; Trusts Act, 1921 (s. 7).



assignee is to be concerned with the application of any money which he may pay to the trustees. But even without such a clause there is no authority for charging the debtor or any assignee with any duty to see to the application of the money by the trustees; <sup>1</sup> and if such a duty did exist, it is difficult to see how such a clause could afford protection.

(iv) *Bonds to Liferenter and Fiar.*

**748.** Bonds to liferenter and fiar are very inconvenient. Both liferenter and fiar must concur in assigning or discharging. A trust is more appropriate.

SECTION 2.—ASSIGNATIONS OF BONDS.

**749.** The rule of the common law (still recognised in many contracts; see ASSIGNATION) was that neither party could substitute another in his place, and therefore it was held incompetent for a creditor to assign his bond to a new lender without the debtor's consent. This difficulty was overcome by the creditor giving the new lender an irrevocable mandate to recover principal and interest. The next stage was a direct assignation, supplemented by a clause of mandate. Finally, the Transmission of Moveable Property (Scotland) Act, 1862,<sup>2</sup> left the direct assignation without the mandate. The Act introduced two new forms, the one to be written separately, and the other to be annexed to the bond. In the statutory forms the destination is to the assignee "and his heirs or assignees," but it is better to substitute "executors." If the assignation is partial only, the exact extent must be stated. If the grantee is not the original creditor his title will be briefly deduced. The abbreviated deduction of title introduced by the Conveyancing (Scotland) Act, 1924,<sup>3</sup> does not apply to assignations or discharges of personal bonds.

**750.** The statutory forms of assignation contain no clause of warrandice, which, however, is a matter of importance. If the assignation is gratuitous, there is implied simple warrandice, *i.e.* against future acts and deeds. The warrandice implied in a sale of a debt is from fact and deed, and, further (the transaction being onerous), there is implied warrandice that the debt exists and is due to the assignor, *i.e.* *debitum subesse*.<sup>4</sup> This is the rule even though the price fall short of the debt, and in that case the warrandice extends to the full debt, and is not limited to the price.<sup>5</sup> Even express warrandice from fact and deed does not exclude the implied warrandice *debitum subesse*. "The warrandice expressed left the warrandice implied from the nature of the transaction untouched."<sup>6</sup> But there is no implied warrandice of the solvency of the debtor, nor has absolute warrandice that effect.<sup>7</sup>

<sup>1</sup> *Buchanan v. Glasgow University*, 1909 S.C. 47.

<sup>2</sup> 25 & 26 Vict. c. 85.

<sup>3</sup> 14 & 15 Geo. V. c. 27.

<sup>4</sup> *Sinclair v. Wilson & Maclellan*, 1829, 7 S. 401.

<sup>5</sup> *Houstoun v. Corbet*, 1717, Mor. 16619.

<sup>6</sup> *Ferrier v. Graham's Trs.*, 1828, 6 S. 818.

<sup>7</sup> *Barclay v. Liddel*, 1671, Mor. 16591; Bell, Prin., s. 1469.



**751.** The assignee of a personal bond is exposed to all exceptions pleadable against the assignor. Thus the debt may have been wholly or partly repaid, or there may be compensating claims. The new lender is not in safety to take an assignation without first making inquiry of the debtor whether the whole debt still remains due and unaffected in any way.

### SECTION 3.—BOND AND ASSIGNATION IN SECURITY.

**752.** This is the form of deed used when security for the debt is constituted over personal property, such as life policies, legacies, shares of trust estates, etc.; also over leases, recorded or unrecorded (see LEASE); also sub-securities over heritable securities, which are not uncommon. Confining attention to the first of these classes, even the latest Conveyancing Act provides no facilities for such securities. The consequence is that either unduly wide powers must be given to the creditor, enabling him to deal with the security as if it were his own property, or the deed is greatly lengthened by the insertion of clauses giving powers of sale and other powers, and regulating their exercise. In the case of securities over life policies, there must also be obligations for keeping them in force and renewing them. The bond will be followed by intimation to the insurance company, and it is necessary to ascertain beforehand that the company have no claim against the policy, and what notices they have received affecting it. The insured's age should also be admitted by the company. Any assignation of the bond, and the discharge of it, will in like manner be intimated to the company, and assignation will also be intimated to the debtor under the bond. No assignation should be taken without first making inquiries both of the debtor and of the company.

### SECTION 4.—BOND AND DISPOSITION IN SECURITY.

#### SUBSECTION (1).—*General Form.*

**753.** This is the usual form in which securities for money are created over heritable property. The form is statutory,<sup>1</sup> and it has been altered by the 1924 Act<sup>2</sup> in one respect only, but that is a most important respect. By s. 9 of that Act it is provided that it shall not be necessary in any bond and disposition in security, or other writ constituting heritable security, to repeat or refer to any conditions or clauses affecting the property, whether prohibitory, irritant, resolutive, or otherwise. This is retrospective in two senses: it applies (1) whether the conditions or clauses were or are created before or after the commencement of the 1924 Act, and (2) although the bond or other security was created before the commencement of the Act. These rules are applied also to

<sup>1</sup> Titles to Land Consolidation (Scotland) Act, 1868, 32 & 33 Vict. c. 116, Sched. FF.

<sup>2</sup> 14 & 15 Geo. V. c. 27.

deeds and instruments transmitting or otherwise dealing with heritable securities. But they do not apply to a disposition granted when a bondholder sells under the power of sale; nor to a disposition to himself under foreclosure proceedings; nor to a decree in such proceedings; nor to any other decree (*e.g.* adjudication for debt) by which a security is, or may be, converted into a right of property; nor to securities by *ex facie* absolute dispositions.

**754.** The effect and operation of the technical clauses in the bond were declared and regulated by s. 119 of the 1868 Act, but that section is modified and largely superseded by ss. 25, 26, 32-42 of the 1924 Act.

#### SUBSECTION (2).—*Receipt and Obligation.*

**755.** A heritable security for money must be (1) definite in name of creditor, (2) for a sum definite in amount advanced at or prior to the delivery of, or infestment on, the bond, whichever may be later in date.<sup>1</sup> When it is admitted or proved that the statement of amount in the bond is not correct, the *onus* is on the creditor to prove that a debt, and how much, is due.<sup>2</sup> The Act 1696, c. 5, annuls securities for debts “to be contracted for the future,” so far as regards any debt “contracted after the infestment.” But where the creditor had insisted on having the deed recorded before he advanced the loan, and it was established that the bond was not delivered, nor the loan paid over, until after infestment, it was held that the Act did not apply.<sup>3</sup> Nor does the Act apply where there is an absolute obligation on the part of the lender to make the advance.<sup>4</sup> But the fact that the bond is written for a specified sum, when an indefinite obligation for future advances is intended, does not make the security effective as regards future advances. In this connection the rule of law applicable to debit and credit entries in an account current must be kept in view. The Act applies to securities over redeemable as well as over irredeemable rights.<sup>5</sup> An exception is made by statute to meet the case of cash credits and obligations of relief to cautioners. Another way of getting over the difficulty is by an ABSOLUTE DISPOSITION (*q.v.*), with or without a back-bond.

**756.** The common-law rule, requiring the specification of a definite sum, does not prevent the constitution of securities for obligations *ad factum præstandum*. Accordingly, it sometimes becomes of importance to determine the quality of the particular obligation. In *Edmonstone*,<sup>5</sup> the obligation was to purchase and transfer to the creditor a certain amount of Government stock. This was an obligation which could be implemented only by expenditure of money, and that of an indefinite amount; but it was held to be an obligation *ad factum præstandum*, and therefore well secured.

<sup>1</sup> Ross's L.C., Land Rights, ii. 632 *et seq.*

<sup>2</sup> *Keith v. Cairney*, 1917, 1 S.L.T. 202.

<sup>3</sup> *Dunbar v. Abercromby*, 1789, Ross L.C., ii. 638.

<sup>4</sup> *Dempster v. Kinloch*, 1750, *ibid.*, 632.

<sup>5</sup> *Edmonstone v. Seton*, 1888, 16 R. 1.

SUBSECTION (3).—*Interest.*

**757.** The bond must be precise as to the rate and the date from which interest is to run, otherwise there is no security for interest. *Quære* whether there is any security for principal either, if the starting date for interest is not expressly stated; see *Assignment of Rents, infra*. A condition “punctual payment” in a back letter is most strictly enforced.<sup>1</sup>

SUBSECTION (4).—*Disposition in Security.*

**758.** In principle there is no difference between descriptions in permanent titles and in securities; and the conveyancing statutes neither recognise nor suggest any variation in practice (see DISPOSITION). It is to be kept in view that the description may have to be carried into an absolute title following on a sale or foreclosure. But, as stated above, no reference to conditions of title is required in the dispositive clause in the bond. It is desirable in securities over buildings to convey the fittings, etc., which may in certain events improve the creditor’s position.

SUBSECTION (5).—*Assignment of Rents.*

**759.** In terms of s. 25 (1) (a) of the 1924 Act this clause imports—

1. An assignment to the creditor of the rents and other duties (including feu-duties and casualties in the case of a superiority and ground annuals and grassums in the case of a ground annual) payable after the date from which interest on the principal sum commences to run, irrespective of legal or conventional terms. This furnishes another reason why it is essential to state in the bond the date from which interest starts.

2. A power to the creditor to insure all buildings against loss by fire for such sum as may be necessary to cover the creditor’s interest in them, and to recover the premiums from the debtor. But there is no heritable security for the premiums unless and until the creditor enters into possession. If such security is to be created, a specific annual sum will be specified subject to accounting.

3. Power to the creditor on default in payment of principal or interest, or on the notour bankruptcy of the proprietor, or on his granting a trust deed for creditors, to enter into possession and uplift the rents and other duties, and to insure against loss by breakage of glass and against claims by tenants and third parties, and against such other incidental risks as a prudent proprietor would reasonably insure against, and to make all necessary renewals and repairs on the property. To constitute “default” does not require the service of a statutory notice of demand. If such a demand is made there is default if payment is not made immediately, and not merely on expiry of three months.<sup>2</sup>

<sup>1</sup> *Alston v. Nellfield Co.*, 1915 S.C. 912; *Gatty v. MacLaine*, 1921 S.C. (H.L.) 1.

<sup>2</sup> *M'Ara v. Anderson*, 1913 S.C. 931.



If the default is in payment of interest it does not appear that any demand at all is required, but the interest must be in arrear at the service of the summons or writ.<sup>1</sup> A bondholder in possession is entitled to delivery of leases.<sup>2</sup>

4. An obligation on the creditor to account to the debtor for any balance of rents or other sums actually received beyond what is necessary for principal, interest, penalty, and expenses incurred in reference to the possession, including factorage, management, insurance, renewals, and repairs.

**760.** The assignation of rents is perfected by recording the bond without the necessity of intimation to the tenants, and is, without intimation, preferable (as regards the rents included in the assignation in the bond, and excepting arrears) to a mere assignation or arrestment, even though intimated or used before the infeftment on the bond.<sup>3</sup> If it were otherwise, no one could lend on land on the faith of the records; he would also need to make inquiries of all the tenants as to assignations or arrestments. But as to competition between a recorded bond and retention by the debtor's factor of rents collected by them under his mandate, see the case cited.<sup>4</sup> The tenants are entitled to pay to the proprietor until they are interpellated by the bondholder. To prevent payment, all that is required is actual notification by the creditor to the tenants of the assignation and his active claim to the rents; but to give the creditor, in turn, an active title to uplift the rents, the procedure is by action of MAILLS AND DUTIES (*q.v.*).

**761.** In cases where the security consists of or includes feu-duties or ground annuals there had been difficulty in the way of the bondholder entering into possession, an action of mailles and duties having been held incompetent. This is remedied by s. 76 of the 1924 Act, which introduces a decree of declarator applicable to securities of that nature. The action proceeds, and the decree operates, as in the case of mailles and duties, and the crave for declarator may be combined with an action of mailles and duties.

**762.** The Heritable Securities Act, 1894,<sup>5</sup> authorises (ss. 6 and 7) a creditor in possession to grant leases not exceeding seven years; and he may apply to the sheriff for power to lease for longer periods, up to thirty-one years for minerals and twenty-one years in other cases.

**763.** Until 1894, if the proprietor was in personal possession he could not be removed summarily, but only by an action of declarator in the Court of Session;<sup>6</sup> and he cannot be made to pay rent for his own property.<sup>7</sup> Under the 1894 Act (s. 5), if interest is due and unpaid, or if the principal is unpaid after statutory demand, the proprietor in

<sup>1</sup> *Graham's Trs. v. Dow's Tr.*, 1917, 2 S.L.T. 154.

<sup>2</sup> *Macrae v. Leith*, 1913 S.C. 901.

<sup>3</sup> Bell, *Convey.*, 641.

<sup>4</sup> *Stevenson, etc. v. Dawson*, 1896, 23 R. 496.

<sup>5</sup> 57 & 58 Vict. c. 44.

<sup>6</sup> *Scottish Prop. Inv. Co. v. Horne*, 1881, 8 R. 737.

<sup>7</sup> *Smith's Trs. v. Chalmers*, 1890, 17 R. 1088.



such a case is deemed to be in possession without a title, and may be summarily ejected.

**764.** The Act does not lay down the lines on which the accounting between the creditor who has been in possession and the debtor, or a postponed creditor, is to proceed. In what instalments is the creditor bound to impute any "balance of rents" to the principal of his debt? Authority is wanting; but the Act is very careful to protect the creditor against the debtor redeeming the security without ample and convenient notice, and it would be only equitable and consistent that the creditor should not be bound to apply rents to principal except in reasonable amounts (what is reasonable being, as usual, a question of circumstances), all sums unapplied being of course kept in bank at interest.

#### SUBSECTION (6).—*Assignment of Writs.*

**765.** This clause is (1924 Act, s. 25 (1) (b)) declared to carry writs and securities, with power to deliver on a sale such writs, etc., as are in the bondholder's possession, but subject to prior rights. Perhaps even this section does not make quite clear what are the rights as regards the custody of the title deeds. At least in the case of landed estates the lender should specially stipulate for delivery if desired. So far as writs are not delivered there should be a discharge of lien if s. 27 of the 1924 Act is not sufficient in the circumstances.

**766.** This clause does not create a *jus quæsitum* in the bondholder in relation to contracts made between the borrower and third parties after the date of the bond; the borrower can neither enforce these nor resist the reduction of them.<sup>1</sup> Nor is the bondholder bound by personal contracts made by the borrower, *e.g.* an obligation in a charter to impose conditions on the property included in the bond.<sup>2</sup>

#### SUBSECTION (7).—*Warrandice.*

**767.** If the obligation of warrandice is granted only by the borrower, it adds nothing to the creditor's security. It is, however, a convenient clause in which to specify prior or *pari passu* securities excepted from the warrandice. But the enumeration of these will not of itself create a prior or *pari passu* ranking in favour of the excepted securities.

#### SUBSECTION (8).—*Redemption.*

**768.** Under s. 119 of the 1868 Act, s. 49 of the 1874 Act, and s. 32 of the 1924 Act, the effect of the clause reserving power of redemption is as follows:—

1. The creditor is entitled to insist that repayment be (a) full, not partial, (b) at the term of payment, or a term of Whitsunday or Martin-

<sup>1</sup> *Heron v. Martin*, 1893, 20 R. 1001.

<sup>2</sup> *Morier v. Brownlie and Watson*, 1895, 23 R. 67.

mas thereafter, (c) after three months' notice, and (d) unconditional, and as a final settlement of accounts.<sup>1</sup>

2. The notice is given in the same manner as a notice calling up a bond, as fully stated below. This notice is not cancelled by the bondholder having entered into possession.<sup>2</sup> A postponed bondholder who has sold the property under his bond is entitled to give notice for redemption of prior securities.<sup>3</sup> The creditor to receive notice is the person appearing on the record as holding the last recorded title to the bond, or, if he be dead, the reputed substitute or person entitled to succeed, notwithstanding any alteration of the succession not appearing on the register of sasines. Of course, if the creditor has demanded payment, the debtor does not require to give notice.

3. If on account of the death or absence of the creditor or from any other cause a discharge cannot be obtained, the amount of the debt is consigned in the bank specified in the bond, or, if none specified, in an incorporated Scots bank. Following on the consignment, a certificate expedited by a law agent or notary public (to whom the deposit receipt is produced) is recorded in the register of sasines. The effect of the consignment and recorded certificate is to disencumber the lands of the security. This procedure does not apply to the refusal of a discharge owing to a dispute as to the amount of the debt.<sup>4</sup>

#### SUBSECTION (9).—*Obligation for Expenses.*

**769.** Obligation for expenses means (1924 Act, s. 25 (2)) that the debtor is liable to the creditor for the expenses of the bond itself, and of recording it, and all reasonable expenses in calling up the bond, and realising or attempting to realise the property, and exercising the other powers conferred on the creditor. This liability appears to arise under the 1924 Act apart from the expenses clause in the 1868 Act form of bond and disposition in security. But neither the one nor the other covers the expense of assignments carried through without reference to the debtor; if the expense of assignments is to be thrown on the debtor, an arrangement must be made with him, or the loan must be called up. Again, if the loan is split up without the debtor's consent, it does not appear that he is liable, when he comes to pay off the loan, for more than one set of expenses as for one discharge of the whole debt.

#### SUBSECTION (10).—*Power of Sale.*

**770.** Under the statutory enactments the procedure under and the effect of the clause as to power of sale are as follows:—

A notice in a simplified form demanding payment and intimating

<sup>1</sup> *Bruce v. Scottish Amicable Assur. Soc.*, 1907 S.C. 637.

<sup>2</sup> *Munro v. Dunlop*, 1838, 16 S. 335.

<sup>3</sup> *Adair's Tr. v. Rankin*, 1895, 22 R. 975.

<sup>4</sup> *Bruce v. Scottish Amicable Assur. Soc.*, *supra*.

that, failing payment within three months, the property may be sold is prescribed by the 1924 Act (s. 33). It is signed by the creditor or by a law agent or notary, without witnesses. The period of three months may (s. 35) be shortened or dispensed with by the person who receives the notice, with consent of any *pari passu* or postponed bondholders. The notice need not be for Whitsunday or Martinmas. This three months' notice is required only as a preliminary to a sale of the property; the personal liability may be enforced at any time on a six days' charge, and even though a notice with a view to sale may have been served and be current.<sup>1</sup>

**771.** The notice is addressed to the person infest in the property and appearing on record as proprietor, or, if the person last infest is dead, then to the reputed substitute or person entitled to succeed in terms of the last recorded title, notwithstanding any alteration of the succession not appearing on the register of sasines. If the last proprietor was an incorporated company which has been removed from the register of joint-stock companies, or a person deceased whose heirs are unknown, the notice is given to the Lord Advocate (1924 Act, s. 33). If the debtor has been sequestrated the notice is given to the trustee (unless discharged), and also to the bankrupt. If the proprietors are trustees it is sufficient to give the notice to a majority infest. There is no duty to give notice to any other person unless "for the purpose of preserving recourse against such other person." Notice to such other person may be necessary, so that if the sale results in a deficiency, the right of recourse against him may be preserved.

**772.** The notice may be delivered or sent by registered post. If posted, it dates from the following day. If the address is unknown, or if a posted notice is returned undelivered, it is given edictally. The notice is proved by a written acknowledgment of receipt; or by a certificate by the giver of the notice, with the registration receipt if given by post (1924 Act, s. 34).

The notice ceases to be effective for a sale after five years from its date or from the date of the latest exposure, if any (1924 Act, s. 33).

**773.** Section 16 of the Heritable Securities Act, 1894, provides for these cases, viz.:

1. Debtor dead; no title completed by heir, and name and address of heir unknown.

2. Debtor's address, and whether he is alive, unknown.

3. Address unknown of person entitled to receive notice.

In each of these cases the creditor may apply to the sheriff of the county in which any portion of the property is situated for warrant of edictal intimation to the debtor in such manner as the sheriff may prescribe.

**774.** On expiry of the notice without payment the creditor must advertise the sale. The advertisement must specify the property; day, hour, and place of sale; and upset price; but it need not state that the

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<sup>1</sup> *M'Whirter v. M'Culloch's Trs.*, 1887, 14 R. 918.



sale is under a bond. For a first exposure the period of advertisement is not less than four consecutive weeks when the upset price or cumulo upset prices do not exceed £1000; when that figure is exceeded, the period is six weeks prior to the date of sale. For a re-exposure the period of advertisement is not less than three consecutive weeks. The advertisement must be inserted once a week in—

1. A daily paper published in Edinburgh or Glasgow; and
2. A paper circulating in the district in which the property or the chief part is situated, and published either in the county or in the next or a neighbouring county of Scotland. But this is subject to three qualifications:

- (1) When the property is in Midlothian the advertisements need be in only one daily paper published in Edinburgh.
- (2) When the property is in Lanarkshire the advertisements need be in only one daily paper published in Glasgow.
- (3) When the upset price or cumulo upset prices do not exceed £1000 it is sufficient to advertise—
  - (1) Twice a week in a paper circulating in the district where the property or the chief part is situated, and published in that county or in the next or a neighbouring county of Scotland; or
  - (2) Once a week in each of two such papers; or
  - (3) Once a week in one such paper and once a week in a Scottish daily paper circulating in the district, irrespective of its place of publication.

Advertisements are proved by a copy with certificate by the newspaper. A week means seven consecutive days (1924 Act, ss. 36–38).

**775.** The date of exposure must not be less than forty-two days from the first advertisement if the upset or cumulo upsets exceed £1000; if not, then not less than twenty-eight days; for a re-exposure not less than twenty-one days. The exposure may be in Edinburgh or Glasgow, or in any burgh in the sense of the Town Councils Acts situated within the county in which the property or the chief part lies, or which is nearest to the property or the chief part whether in the same county or not (1924 Act, ss. 38, 39).

**776.** The sale may be in whole or in lots, at such upset price or prices as the creditor thinks proper. There may be conditions as to apportioning feu-duty, ground annual, stipend, valued rent, and land tax; also providing that the proprietor of any lot shall relieve the proprietors of the other lots of the whole or part of feu-duty, casualties, ground annual, stipend, and land tax; and a real burden may be created for that purpose (1924 Act, s. 40). Further (s. 25), even apart from an actual sale, the creditor, after failure to comply with a demand for payment, is entitled to obtain an allocation of feu-duty or ground annual with or without augmentation.

**777.** The sale proceedings are valid notwithstanding that the person to whom notice is given is a pupil, or minor, or legally incapable.



The sale and disposition are as valid to the purchaser as if made by the proprietor not under disability. The disposition imports, and therefore it is unnecessary to insert—

1. An assignation to the purchaser of the warrandice contained or implied in the bond ; or

2. An obligation by the granter of the security to confirm the sale and disposition.

After 31st December 1929, in the case of a disposition recorded before the Act, and after five years from the date of recording a disposition after the Act, the disposition is not challengeable—

1. On the ground that the debt had ceased to exist, unless that appeared on the register of sasines, or was known to the purchaser, before he paid the price ; nor

2. On the ground of want or defect of notice or advertisement, or that the power of sale was improperly or irregularly exercised ; without prejudice to any claim of damages against the selling bondholder (1924 Act, s. 41).

**778.** If there is any surplus, it is consigned in names of seller and purchaser in a bank specified in the articles of roup. Whether there is, or is not, a surplus, a statement of intromissions is prepared and signed by the creditor or his agent. There is then obtained from any law agent (but not the same agent who signs the statement of intromissions), or notary, a certificate that the statement has been submitted to him, and that it shews either no surplus, or a surplus of a stated amount. If there is a surplus, the bank deposit receipt for it is presented, and the certificate certifies to the fact of consignment, specifying the bank and branch, the date of the deposit receipt, the amount of it, and the names on it. The record is cleared by recording—(1) the disposition to the purchaser ; (2) a certificate as to surplus, or of no surplus, as the case may be (1924 Act, s. 42).

#### SUBSECTION (11).—*Who may Purchase.*

**779.** The case noted below <sup>1</sup> may be studied with benefit on the important questions which may arise regarding the competency of particular persons purchasing when a bondholder sells. The direct question in that case was whether an unsuccessful offerer at the roup was entitled to object to the enactment in favour of one of the seven joint bondholders who sold under the power in their bond, and to obtain the property for himself at his first bid, there being no other offerer ; there was no objection stated by any of the other bondholders or by the owner ; the challenge failed. It is doubtful whether the owner or debtor or a competing offerer is entitled to object to a sole bondholder purchasing ; also whether the owner may bid.<sup>2</sup> The holder of another bond may do so.<sup>3</sup>

<sup>1</sup> *Wright v. Buchanan*, 1917 S.C. 73.

<sup>2</sup> *Jamieson v. Edinburgh Mutual Soc.*, 1913, 2 S.L.T. 52.

<sup>3</sup> *Scottish Imp. Ins. Co. v. Lamond*, 1883, 21 S.L.R. 98.

SUBSECTION (12).—*Sale by pari passu Bondholder.*

780. Until 1894, though the holder of a *pari passu* security had a title to exercise the power of sale, he could not force his co-creditor ranking *pari passu* to discharge his security for less than full payment ;<sup>1</sup> and so it resulted that a sale under such circumstances was practicable only on condition that a price was obtained sufficient to pay off both loans in full, otherwise the whole loss (and not only a share of it) would have fallen on the selling creditor. By s. 11 of the 1894 Act, in such circumstances the sheriff may grant warrant to sell on the application of a *pari passu* bondholder, "if in his opinion it is reasonable and expedient that such sale should take place"; the sheriff fixes the price in case of difference in opinion ; the expenses are the first charge ; and the balance of the price is "paid to the creditors in the securities charged upon the lands according to their just rights and preferences."

SUBSECTION (13).—*Power to Creditor to Purchase.*

781. By the 1894 Act power was for the first time given by statute to a selling bondholder to purchase. The procedure is :

1. Exposure (after requisition and advertisement as before explained) at a price not exceeding the amount due under the bond and under any prior and *pari passu* securities, but not including expenses of exposure or prior exposures. Apparently the whole property held in security under the bond must be brought into the exposure.<sup>2</sup>

2. Failing a sale, an application to the sheriff for a decree forfeiting the right of redemption, and declaring the creditor to be absolute proprietor at a price named, *i.e.* the price at which the property was last exposed. The defenders are (1) the debtor, (2) the proprietor, (3) other heritable creditors. The decree, if granted, may be recorded, and this disencumbers the property of all securities and diligences posterior to the security of the purchasing creditor. The decree must refer to burdens and conditions of the title.<sup>3</sup>

3. Instead of granting decree, the sheriff may order re-exposure at a price fixed by him ; the creditor may then bid and purchase ; and if he purchases, he may grant an absolute disposition to himself as if he were a stranger, or he may obtain decree in the terms above mentioned. The disposition or decree must refer to burdens and conditions of the title.<sup>3</sup> The decree or disposition requires a conveyance on sale stamp duty.<sup>4</sup>

4. The surplus, if any, is consigned in terms of Acts ; if there is none, a certificate to that effect is recorded. The personal obligation of the debtor remains in force for any unpaid balance of the debt. Sec. 10 of the 1894 Act protects parties dealing with a bondholder who has acquired

<sup>1</sup> *Nicholson's Trs. v. M'Laughlin*, 1891, 19 R. 49.

<sup>2</sup> *Webb's Exrs. v. Reid*, 1906, Edin. Sh. Ct., 14 S.L.T. 323.

<sup>3</sup> 1924 Act, s. 9.

<sup>4</sup> *Int. Rev. v. Tod*, 1898, 25 R. (H.L.) 29.

an absolute title, but not the bondholder himself or his gratuitous successors.<sup>1</sup> The protection covers the steps before as well as after the application to the sheriff, but possibly not steps more serious than irregularities.<sup>1</sup> The application may be to the sheriff of the county in which the property or any part of it is situated. The sheriff is final except (1) on questions of title, and (2) when the principal of the pursuer's debt exceeds £1000.

#### SUBSECTION (14).—*Back Letters.*

**782.** It is very common to insert the rate of 5 per cent. interest in the bond, and to regulate the actual rate by a separate back letter or agreement of that nature. This saves expense on the occasion of changes in the rate of interest ; and besides, if a lower rate were specified, and if it were subsequently wished to raise it, the existence of postponed bonds might prevent security being given for the higher rate. Such an agreement may also regulate the duration of the loan. If not attested, it ought to be adopted as holograph.

#### SUBSECTION (15).—*Special Clauses.*

**783.** Special clauses are necessary in the bond under a great variety of circumstances, including arrangements for prior, *pari passu*, or postponed ranking ; obligations for maintenance of life policies ; and power to feu.

##### (i) *Ranking.*

**784.** If the bond is to rank before, or *pari passu* with, bonds already recorded, by virtue of a power to that effect contained in these securities, the new bond should briefly state the power and expressly bear to be granted in exercise of it. *Pari passu* ranking may be secured by clauses in the bonds. It is also effected by the provision in the 1868 Act (s. 142), that when two or more writs transmitted by post to the keeper of the general register are received at the same time, they shall be deemed to be presented and registered contemporaneously ; but this is not a method to be recommended ; for one thing, the result does not appear plainly upon a search. A clause of postponed ranking either refers to some specified security about to be granted, or it takes the form of a power to the debtor to incur and secure preferable or *pari passu* debt not exceeding a certain sum. In the latter case, it is essential (1) to make it clear in the clause whether the proprietor's power is limited to the single constitution of the preferable debt, or whether it authorises successive reborrowings and reconstitutions of securities from time to time, so long as the maximum is not exceeded ; and (2) to make it express in bonds subsequently granted

<sup>1</sup> *Sutherland v. Thomson*, 1905, 8 F. (H.L.) 1 ; *M'Donald v. Winkler*, 1903, 10 S.L.T. 551.

in terms of the reserved power and intended to enjoy the prior or *pari passu* ranking, that such is the intention.

(ii) *Premiums of Insurance, etc.*

**785.** In framing obligations in heritable securities for the maintenance of life policies, it is necessary to have regard to the rule that there can be no indefinite money burden on heritage. The expedient is to specify an annual sum, subject to accounting.

(iii) *Power to Feu.*

**786.** A minimum feu-duty will be specified, and clauses annexed prohibiting the discharge of any security or remedy for recovery of the feu-duties, etc. It may also be necessary to regulate the class of buildings to be allowed. In all feus consented to by the creditor, whether under such a general clause, or under a general deed of consent, or by special consent to the particular feu, there is this risk, that if the obligations incumbent upon the debtor-superior are not duly fulfilled, the creditor cannot enforce payment of the feu-duties.<sup>1</sup>

SECTION 5.—ASSIGNATIONS.

**787.** Great changes have been introduced by the Conveyancing Act, 1924, regarding the forms of writs of assignation, restriction, and discharge of a bond and disposition in security and the requirements as to the title of the granters. As regards assignments the new features are—

1. If the transfer is to the new lender, without any further destination, executors and assignees are implied in the assignation, even though executors are excluded by the bond or previous assignation. If it is desired to exclude executors, or to continue their exclusion, there will be inserted “and his heirs (excluding executors) and assignees.” On the other hand, if executors already stand excluded, and it is intended not to continue the exclusion, it is suggested that it is better practice to insert the words “and his executors and assignees.”

2. No description of, or reference to, the property (s. 31).

3. No reference to burdens and conditions of title (s. 9 (1)).

4. The following are carried by implication (s. 28) : (1) the creditor's right to the writs ; (2) all corroborative or substitutional obligations for the debt or any part thereof, whether in bonds or clauses of corroboration, or agreements *in gremio* of conveyances, or by operation of law, or otherwise ; (3) right to recover from the debtor all expenses properly incurred by the creditor in connection with the security ; and (4) all procedure which has followed on the bond.

5. Deduction of title is limited to specification of (1) the last recorded

<sup>1</sup> *Arnott's Trs. v. Forbes*, 1881, 9 R. 89.



title to the bond, and (2) writs, if any, subsequent to the last recorded title. No mention is made of writs, however numerous, prior to the last recorded title (s. 31).

6. A creditor uninfert can, without completing title, grant an assignation which is a warrant for direct infertment of the assignee, by the recording of the assignation without anything more, provided the granter's title is *in gremio* deduced by specification of (1) the last recorded title to the bond, and (2) subsequent writs (s. 3, Sched. K, note 2).

7. In the case of heritable securities from which executors are not excluded, confirmation gives executors (1) a title to the debt ; (2) warrant for assigning, discharging, and otherwise dealing with the debt and security without completing title ; and (3) warrant for completing title. This applies whether the deceased was infert or uninfert, and whether he died testate or intestate. The condition is that the confirmation "includes such security," which it is thought does not mean that the security must have been valued at par. For those purposes "confirmation" includes probate, or letters of administration, or other grants of representation issued by any court in England and Northern Ireland or the British Dominions if certified or sealed in the commissariat of Edinburgh. These grants imply survivorship, and they are deemed to include all heritable securities which belonged to the deceased and from which executors are not excluded (s. 5 (2)).

**788.** Warrandice is another matter of importance in deeds of assignation. The statutory form of assignation of heritable securities contains no clause of warrandice. The implied warrandice is serious, as to which see the case cited.<sup>1</sup> If the creditor is really selling the security, it is right that he should warrant the security and his title to it to the purchaser who takes the assignation. But in the ordinary case both the assignor and the assignee deal, not with each other, but with the debtor. The views suggested are—

1. *As Regards the Old Creditor.*—He is not bound to grant an assignation if it will prejudice him. But the implied warrandice in an assignation is much higher than, and quite different from, the warrandice implied in a discharge to the debtor. It is enough to instance such matters as incapacity on the part of the borrower or any intervening assignor, restrictions, postponements, ranking, back letters, etc. The old creditor will accordingly be thereby prejudiced. From which it follows that he is entitled to refuse an assignation except on an express restriction of warrandice to what "would be implied in a discharge granted on repayment by the debtor."<sup>2</sup>

2. *As Regards the New Creditor.*—The question is—as between the debtor and the new creditor, which is to be responsible to the other for the validity of the security and of the transmissions of it? Is the debtor-proprietor to be entitled afterwards to refuse payment on the allegation that there are defects in the transmissions? The view

<sup>1</sup> *Reid v. Barclay*, 1879, 6 R. 1007.

<sup>2</sup> *Russell v. Mudie*, 1857, 20 D. 125.

suggested very clearly is that it is the debtor who tenders the title to the new lender, that therefore the former must warrant it to the latter, and that the new lender is entitled to have this made express by the debtor's concurrence in the deed or otherwise.

#### SECTION 6.—DEEDS OF RESTRICTION.

789. The paragraphs numbered 5, 6, and 7 above in the case of assignments apply to deeds of restriction also, but clearly it is necessary to identify the property which is absolutely released from the security.

#### SECTION 7.—DISCHARGE.

790. The new features are—

1. No description of, or reference to, the property (s. 31).
2. Deduction of title is limited to the specification of (1) the last recorded title to the bond, and (2) writs, if any, subsequent to the last recorded title.
3. A creditor, uninfert, can, without completing title, grant a discharge which is completely effectual by being recorded, without anything more, provided the granter's title is *in gremio* deduced by specification of (1) the last recorded title to the bond, and (2) subsequent writs (s. 3, Sched. K, note 2).

4. As to confirmation as stated above with reference to assignments, it is nowhere said that the statutory form of discharge extinguishes all corroborative and substitutional obligations, as s. 28 does regarding assignments, but it is thought that that must necessarily be so, seeing that the debt is paid and extinguished. Even in the case of additional heritable security separately created for the debt, it cannot be doubted that it must fall with the extinction of the debt; but without an express discharge the position would be very unsatisfactory regarding the added property, both as to title and in the keeping of the register. In such a case an express disburdening is advised. And there ought to be an express discharge of (1) any obligation by which the principal debt has been increased, *e.g.* by accumulation of interest, or (2) any bond of corroboration and disposition in security though only for the original amount and over the original property, but in these cases no express disburdening is required.

791. It is an important question whether an assignee may be affected by modes of extinction of the security which do not appear on the record, *e.g.* an unrecorded discharge, payment (most often payment on account) made on a simple receipt, intromissions, etc. It apparently is the case that the assignee is exposed to this risk. Prof. G. J. Bell refers to the faith of the records as protecting assignees of heritable securities against reduction on the ground of error or force,<sup>1</sup> but in the same work<sup>2</sup> he is explicit that heritable

<sup>1</sup> Bell, Prin., s. 14.

<sup>2</sup> *Ibid.*, s. 909.

securities in the modern form may be extinguished by payment, though he does not expressly refer to *bona fide* onerous assignees. It is clear that if the new lender knew the facts he would not be entitled to rely on the faith of the records,<sup>1</sup> and if the facts appeared from a marking or receipt on the bond, he would be bound to know, or at least it would be held that he ought to have known. But suppose *bona fide* ignorance? Even in that case it can now hardly be questioned that the extinction will be effectual against the assignee. In *Jackson v. Nicoll* <sup>2</sup> it was held as against an onerous assignee that the security was extinguished following on the extinction of the debt, and that again depended on the application of the rule as to indefinite payments in an account current.

#### SECTION 8.—CREDITOR'S SUCCESSION.

**792.** Until 1868 heritable securities taken in favour of the creditor, or the creditor "or his heirs and assignees whomsoever,"<sup>3</sup> were heritable as regards the succession of the creditor. This was altered by s. 117 of the 1868 Act. It was provided that from and after 31st December 1868 all heritable securities, whether granted before or after that date, and "in whatever terms the same may be conceived, except in the cases hereinafter provided," shall be moveable in the succession of the creditor, and belong to the executors or representatives *in mobilibus*. The exceptions are: (1) that if executors are expressly excluded, the security is heritable and goes to the heir; and (2) that in all cases, even though executors are not excluded, the security is heritable as regards the fisk, rights of husband and wife, and legitim. The words "in whatever terms the same may be conceived" are peculiar. Take the case of a security destined to the creditor "and the heirs-male of his body." It cannot be doubted that that destination would receive effect notwithstanding that it can scarcely be said that there are words "expressly excluding executors," and that the Act provides that, in the absence of such words, the security "in whatever terms conceived" . . . "shall belong to the representatives *in mobilibus*." But if the destination failed to take effect, the bond would be moveable. The exclusion of executors may be in the bond or in an assignation (Sched. GG) or in a recorded minute. It may be removed by recorded minute or "by assigning, conveying, or bequeathing such security to himself, or to any other person without expressing or repeating such exclusion." Apparently the exclusion if contained in the bond or in an assignation, and the removal of the exclusion if resulting from the terms of an assignation, are completed by delivery of the deed; whereas if either the one or the other is intended to be effected by minute, it would appear that the exclusion, or the removal of the exclusion, is not complete until the minute is recorded, and there does not seem to be any warrant for

<sup>1</sup> *Petrie v. Forsyth*, 1874, 2 R. 214; *Stodart v. Dalzell*, 1876, 4 R. 236.

<sup>2</sup> 1870, 8 M. 408.

<sup>3</sup> Securities Act, 1847, Sched. A.



recording it after the creditor's death, when rights at once emerge. *Quære*, Whether a bond is heritable or moveable in the person of the heir after he has succeeded to it by virtue of executors having been excluded? Apparently it is heritable, for the Act provides that where executors are excluded in the security or by minute, "the security shall *continue* to be heritable as regards the succession of the creditor *for the time* holding such heritable security" until the exclusion is removed.

**793.** The exception regarding the rights of husband and wife excludes all heritable securities from the *jus relictæ* and *jus relictî*, except only interest to date of death. But the rights of terce and courtesy attach, subject to the ordinary rules affecting these rights.

**794.** When the position is that the deceased was entitled to the whole or part of a trust fund, wholly or partly invested in heritable securities, the deceased's right is usually of the nature of a moveable *jus crediti* upon the trustees, and therefore the heritable securities will contribute to *jus relictæ*,<sup>1</sup> *jus relictî*, and legitim. In the cases cited weight was attached to the nature of the bonds, but it is submitted that the same result would follow even if the bonds contained exclusions of executors.

#### SECTION 9.—DEBTOR'S SUCCESSION.

**795.** Heritable securities continue heritable in the succession of the debtor. This holds even though the security may not have been recorded by the creditor till after the debtor's death,<sup>2</sup> the question depending, not upon what might be the result in a competition of creditors, but upon the intention of the debtor. So it was held<sup>3</sup> that, though there might be doubt as to the validity of the heritable security, still the fact of such security having been constituted shewed an intention to burden the heir which must receive effect as between him and the executors. If the specific heritage disposed in security is insufficient to meet the debt, the debtor's other heritage, if any, is liable for the balance in relief of his moveable succession.<sup>4</sup> When two or more properties are charged with the same debt, and these properties descend to different heirs, the incidence of the debt as between the heirs is in proportion to the net or clear values of the properties,<sup>5</sup> and if the owner of one estate pays the whole interest (or annuity), the arrears of the proportion applicable to the other estate is a real burden on it in favour of the payer.<sup>6</sup> If a property which is burdened with a bond is bequeathed, the legatee takes it with its burden; and this rule is not displaced by a general direction to trustees to pay all debts.<sup>6</sup>

<sup>1</sup> *Gilligan v. Gilligan*, 1891, 18 R. 387; *Borland's Trs. v. Borland*, 1917 S.C. 704.

<sup>2</sup> *M'Laren*, Wills, ss. 384, 386.

<sup>3</sup> *Bell's Tr. v. Bell*, 1884, 12 R. 85.

<sup>4</sup> *Ferrier v. Cowan*, 1896, 23 R. 703.

<sup>5</sup> *Ibid.*, 1897, 5 S.L.T. 297.

<sup>6</sup> *Brand v. Scott's Trs.*, 1892, 19 R. 768; *Muir's Trs. v. Muir*, 1916, 1 S.L.T. 372.



## SECTION 10.—COMPLETION OF TITLE.

SUBSECTION (1).—*Before 1925.*

**796.** Those acquiring right, whether by testate or intestate succession, to heritable securities in which the deceased was infert, might (and they still may) complete titles as follows :—

|                 |   |                 |  |
|-----------------|---|-----------------|--|
| Testate . . .   | { | Moveable . . .  | { Writ of Acknowledgment <sup>1</sup><br>or<br>Notarial Instrument. <sup>2</sup> |
|                 |   | Heritable . . . | Notarial Instrument. <sup>2</sup>  |
| Intestate . . . | { | Moveable . . .  | Notarial Instrument. <sup>3</sup>  |
|                 |   | Heritable . . . | { Writ of Acknowledgment <sup>1</sup><br>or<br>Notarial Instrument <sup>4</sup>  |
|                 |   |                 | { or<br>Special Service.   |

**797.** If the deceased was not infert, then, whether he died testate or intestate, and whether the succession was heritable or moveable, the only method was by notarial instrument.<sup>5</sup> Before expeding notarial instruments, executors (proceeding as such) must be confirmed, and an heir requires service, which may be general or special ; but, as above stated, special service recorded is itself a title to an heir if the ancestor was infert. An heir of provision may complete title by service.<sup>6</sup>

SUBSECTION (2).—*Under 1924 Act.*

**798.** The new rules are—

1. No completion of title on record is required (s. 3) to enable the creditor to assign, discharge, restrict, or otherwise deal with the security. All that is needed is that the deed granted by him shall specify the last recorded title to the bond and, if that title was not in his favour, the unrecorded writs connecting him with it.

2. If desired, title can in every case be completed on record by a notice of title recorded which contains the same information as just stated in the case of deeds granted without completion of title, but there is no description of the property by reference or otherwise and no reference to burdens or conditions of title.

For adjudication of heritable securities, see ADJUDICATION.

## SECTION 11.—BOND OF CORROBORATION.

**799.** This is a bond under which an existing obligation is corroborated and continued, with or without alteration. The circumstances are many

<sup>1</sup> 1874 Act, s. 63 ; 1868 Act, Sched. II.

<sup>2</sup> 1874 Act, s. 64 ; 1868 Act, Sched. KK ; 1868 Act, s. 19, Sched. L ; 1874 Act, s. 53, Sched. N.

<sup>3</sup> 1868 Act, s. 126, Sched. JJ.

<sup>4</sup> 1868 Act, s. 128, Sched. JJ.

<sup>5</sup> 1868 Act, s. 130, Sched. MM.

<sup>6</sup> *Hare, Petr.*, 1889, 17 R. 105.

under which such a bond may be granted, including the following : (1) to avoid prescription or limitation ; (2) to cure some defect ; (3) to accumulate interest in arrear ; (4) to give the creditor a new obligant, who may be a cautioner, or a purchaser of the security-subjects, or an heir or other successor therein, and (5) to give the creditor's successor a title to the debt without confirmation or other procedure ; but this does not, of course, affect liability for death duties. Bonds of corroboration are substantive obligations, and support action or diligence without reference to the original documents of debt.<sup>1</sup> The narrative clauses are often of great length, but that is unnecessary ; the prior obligation may be very briefly set out, and there is no occasion for a detailed deduction of the title of either debtor or creditor. In the majority of cases the bond gives a personal obligation only, leaving the real security to rest upon the original bond and disposition in security ; but if the cause of granting is the existence of any defect in the original real security, or the principal is being increased by the accumulation of arrears of interest, the new deed must contain a corroborative disposition in security as well.

**800.** The Conveyancing Act, 1874 (s. 47), contained provisions intended to obviate the necessity for bonds of corroboration in many cases. It provided that the personal obligations contained in a heritable security shall "transmit against any person taking such estate by succession, gift, or bequest, or by conveyance, when an agreement to that effect appears *in gremio* of the conveyance . . . without the necessity of a bond of corroboration or other deed or procedure." The above enactment was amended by s. 15 of the 1924 Act. If a successor takes by conveyance dated on or after 1st January 1925 the personal obligation does not transmit against him unless he signs the conveyance, no matter what clause may be contained in the conveyance.

**801.** Where the successor takes "by succession, gift, or bequest," whether before or after the 1924 Act, there is personal liability, apart from both Acts, but only *quantum lucratus*. That limitation of liability is not removed by anything contained in either Act. In these cases the actual provisions in both Acts are confined to the enforcement of that limited liability by summary diligence. The 1924 Act provides that summary diligence shall not be competent unless the successor has signed an agreement to the transmission of the obligation. On the one hand it is clear that, without any such agreement, the successor's limited liability exists and may be enforced by ordinary action. On the other hand, when such an agreement is taken, it may be thought desirable to exclude the suggestion of continued limitation of liability by a few words at the end. Even so, summary diligence will, it is understood, be competent only in the special manner provided in s. 47 of the 1874 Act, and therefore it

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<sup>1</sup> *Beg v. Brown*, 1663, Mor. 16091 ; *Johnston v. Orchardtown*, 1676, Mor. 15798.

may be preferred to take a personal bond of corroboration in ordinary form.

**802.** Annotating the 1874 enactment as thus amended in 1924—

*Quantum lucratus.*—The opening words of s. 47 of the 1874 Act, “subject to the limitations hereinbefore provided as to the liability of an heir for the debts of his ancestors,” refer to s. 12 of that Act, which provides that “an heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds.” A universal legatee has the benefit of this restriction.<sup>1</sup>

*“Security for Money.”*—Therefore, in the case of obligations *ad factum præstandum* there must be a bond of corroboration.

*“Estate in Land.”*—Therefore, where the security is personal property (other than heritable securities and real burdens) there must be a bond of corroboration.

*“Transmit.”*—This word does not mean that the old obligant is discharged; but the word “transmit” does suggest, and it appears clear, that the successor is never liable unless his ancestor was.

*“Taking.”*—The reference is to “any person *taking* such estate.” In the case of an heir mere survivance is not enough: the heir must accept the succession, *e.g.* by making up title or taking beneficial use.<sup>2</sup>

*“Such Estate.”*—This raises the question of the position of parties who take less than the whole security-subjects, *e.g.* (1) a partial legatee, or (2) joint *pro indiviso* legatees or even disponees. It is thought that a legatee of part of the property is not personally liable for the whole debt (even assuming that the value of his part exceeds the whole debt) or for any part of it. It is thought that *pro indiviso* owners are not liable jointly and severally.

*“Agreement to that Effect.”*—A clause declaring that the property is disposed under burden of the bond is not enough,<sup>3</sup> nor is a clause of that kind coupled with an obligation by the disponee to relieve the disponent.<sup>4</sup> The words in the form prescribed in the 1924 Act are that the disponee “by his signature hereto [*i.e.* to the disposition in his favour] undertakes the personal obligation contained in a bond,” etc. The creditor’s concurrence or knowledge is not essential,<sup>5</sup> but the creditor ought to have the custody of the deed.

*“Same Manner as against the Original Debtor.”*—This refers to the enforcement of the new obligant’s liability. That liability is not terminated by parting with the property; but Sched. K to the 1874 Act is awkward in this respect, for it says “the *present* proprietor of the said lands and *as such* the *present* debtor.” It is thought that there must be a consent to registration in the bond in order to warrant the

<sup>1</sup> *Welch’s Exrs. v. Edinburgh Life Assoc.*, 1896, 23 R. 772.

<sup>2</sup> *Fenton Livingstone v. Crichton’s Trs.*, 1908 S.C. 1208.

<sup>3</sup> *Ritchie & Sturrock v. Dullatur Feuing Co.*, 1881, 9 R. 358.

<sup>4</sup> *Carrick v. Rodger*, 1881, 9 R. 242; *Sherry v. Sherry’s Trs.*, 1918, 1 S.L.T. 31.

<sup>5</sup> *Wright’s Trs. v. M’Laren*, 1891, 18 R. 841.



special statutory procedure, but the bond need not be registered. The warrant is to charge only, and though by the Act it is provided that "all diligence may thereafter proceed against the party in common form," it certainly would not be safe to hold that this means more than that it is then competent to obtain letters of arrestment and poiding. In view of the various difficulties which have been referred to, the practical advice offered is, to require a bond of corroboration. This may be very simple, and in the case of a disponee it adds hardly at all to the length of the deed.

**803.** The results of the *in gremio* clause are—

1. The disponee is bound to relieve the disponent when the creditor demands payment, and possibly when relief is called for by the disponent.<sup>1</sup>

2. In ranking on the disponent's estate the creditor does not deduct the value of the security,<sup>2</sup> for the property is not now estate of the bankrupt disponent.

3. In the bankruptcy of the disponee the disponent is entitled to rank for relief before payment, and the ranking is for the whole debt without deduction of the security. But the dividends on the claim will be judicially applied to the debt.<sup>1</sup>

4. If the creditor releases or affects the security without consent of the disponent, the latter is freed from liability for the debt.<sup>3</sup>

**804.** In taking bonds of corroboration it is necessary to bear in mind that they may be struck at as securities for prior debts in the event of notour bankruptcy supervening within sixty days.<sup>4</sup>

**805.** The septennial limitation of cautionary obligations does not apply even to express cautioners in bonds of corroboration.<sup>5</sup> But it appears that this is true only of separate guarantees and that the septennial limitation does apply if both principal and cautioner sign the bond of corroboration, and perhaps even though these are separate deeds if they mutually refer to each other.<sup>6</sup>

**806.** *Stamp.*—(1) If the original document of debt has not borne the mortgage duty of 2s. 6d. per cent., the bond of corroboration must be stamped at that rate. (2) If the original deed was so stamped, the new deed must bear 6d. per cent. with a maximum of 10s.<sup>7</sup> (3) An agreement *in gremio* under the 1874 Act attracts no duty, but such a corroborative incorporated bond as is suggested above would no doubt require 6d. per cent. up to a maximum of 10s. (4) Corroborative obligations, and also additional securities, incorporated with bonds for additional advances or with assignments of the debt, escape duty.<sup>8</sup>

<sup>1</sup> *Todd v. Millen & Somerville*, 1911 S.C. 1189.

<sup>2</sup> *Glasgow University v. Yuill's Tr.*, 1882, 9 R. 643.

<sup>3</sup> *N. Albion Co. v. M'Bean's C. B.*, 1893, 21 R. 90.

<sup>4</sup> *Dunbar's Crs. v. Grant*, 1793, Mor. 1027; Bell, Com., ii. 198.

<sup>5</sup> *Gordon v. Tyrie*, 1748, Mor. 11025.

<sup>6</sup> *Tait v. Wilson*, 1836, 15 S. 221; *Monteith v. Pattison*, 1841, 4 D. 161.

<sup>7</sup> 3 Edw. VII. c. 46.

<sup>8</sup> Stamp Act, 1891, s. 87 (3).



## SECTION 12.—BOND FOR CASH CREDIT.

**807.** A bond for cash credit differs from an ordinary bond inasmuch as it is expressed, not for a specified sum as already resting owing, or immediately borrowed, but for the fluctuating balance on an operative cash account or credit. Naturally, bonds for cash credits are most frequently granted to banks, but they are also ordinary incidents of the financial side of speculative building. Those two classes of cash credit bonds differ in the matter of security. In the bank cases the "security" consists of the signatures of two or more guarantors in addition to that of the bank's customer and true borrower, and usually there is no heritable or other security, though such real securities may also be present. In the building loan cases any guarantor is the exception, but there is always the specific heritable security of the building area and of the buildings as they go up, the advances being regulated by surveyors' certificates, following the rule of a certain proportion of the value placed on the site and put into the building. In determining the amount of the instalment advances two factors have to be kept in view: (1) that the ground burden (feu-duty or ground annual or both) is almost certainly not secured by the site value, and that therefore the first considerable amount of value which is put into the buildings is exhausted by the prior charge of the superior or ground-annual creditor; and (2) that uncompleted buildings command no market except at prices ruinous to the seller, and, therefore, that the part of the agreed credit at any time remaining unadvanced must be sufficient easily to complete the buildings.

**808.** The objects and advantages of the cash credit system are—

1. Interest is incurred, not on the total intended sum from the beginning, but only on the fluctuating daily balances as the customer's requirements demand.

2. The bank system, by the provision of guarantors, enables a merchant to obtain, on the spot in Scotland, and immediately, the benefit of his personal character and credit, as well of his whole assets, of whatever nature, and in whatever quarter of the world these may be at the time, and without interfering with their ordinary use in the pursuit of his commercial undertakings and ventures.

3. When heritable security is involved, the cash credit bond and disposition in security is one of the two forms in which an effectual security can be obtained for future advances; and it will, of course, be understood that each drawing out from a cash credit account is a new borrowing. The other method is an *ex facie* ABSOLUTE DISPOSITION (*q.v.*). An ordinary bond and disposition in security for a fixed sum would be useless, for, though the amount due at the close might be the same as at the start, it would not be the old money and debt, assuming, that is, that the account had been freely operated upon according to the intention of a cash credit. Thus it would result that the money

due at the end had all been advanced after the creditor's infestment on the bond, and there would be no security at all.

**809.** On the legal side the following matters have to be kept in view :—

1. The intended amount of the credit must be stated on the face of the bond, for which there are three reasons : (1) if there are guarantors they would no doubt refuse to sign without a limit ; (2) an unlimited bond cannot be stamped ; and (3) if there is heritable security the Act <sup>1</sup> requires that the principal amount of the credit shall be specified.

2. As summary diligence cannot be done unless the debt is precisely ascertained, and as the very idea of a cash credit is a varying and fluctuating debt, the amount of which at any future date cannot be known, a method must be laid down in the bond itself for ascertaining the amount of the debt at any given date. The method always adopted is an agreement *in gremio* of the bond that the amount shall be ascertained by a stated account with certificate by the manager, cashier, or other principal officer of the bank or other lending company, and that no suspension of a charge following on such proof shall be passed except on consignment of the full certified sum. Such an account and certificate, based on an agreement to that effect in the bond, are complete for the purpose of summary diligence, but they do not bar a challenge of the figures on consignment.<sup>2</sup>

3. When there is heritable security there must be *in gremio* of the bond the technical clause required by the Act,<sup>3</sup> which is fully dealt with below.

4. The clause of consent to registration for execution will expressly be made applicable to stated accounts and certificates as referred to above.

**810.** The relations of parties arising out of the personal obligations are part of the law of CAUTIONARY OBLIGATIONS (*q.v.*), and of the practice of bankers (see BANK). It need hardly be stated that such bonds are invariably framed so as to give the creditor the largest powers and discretions, and to deprive the other parties, and especially guarantors, as far as possible, of legal and equitable rights and remedies. Yet it does occasionally happen that a bank is found to have taken a bond in a form which does not commit the signatories to the full extent which had evidently been contemplated by the bank,<sup>4</sup> which shews that when liability emerges it is worth while to subject the deed to close scrutiny.

**811.** As regards the heritable security, the old rule of Scots statutory law is that an infestment in security is good only for sums advanced at or before the date of the infestment. To meet the convenience of commerce the rule has been modified by a modern

<sup>1</sup> 19 & 20 Vict. c. 91.

<sup>2</sup> Bell, Convey., 268, and cases there cited.

<sup>3</sup> 19 & 20 Vict. c. 91.

<sup>4</sup> *Veitch v. National Bank of Scotland*, 1907 S.C. 554.

statute<sup>1</sup> to the effect of giving validity to infestments on bonds of cash credit.

Provided always that the principal and interest which may become due upon such cash accounts or credits shall be limited to a certain definite sum to be specified in the security, such definite sum not exceeding the amount of the principal sum and three years' interest thereon at the rate of 5 per cent.

When this condition is fulfilled, the borrower may—

operate upon the same by drawing out and paying in such sums from time to time as the parties shall settle between themselves, and that the sasines or infestments taken upon such heritable securities shall be equally valid and effectual as if the whole sums advanced upon such cash account or credit had been paid prior to the date of the sasine or infestment taken thereon.

812. In applying the limitation contained in the above enactment, and assuming a £1000 credit: (1) The statute is not automatic; it is essential that there be an express clause in the bond. (2) It would be fatal if, under a clause of direction or notice of title, the clause of limitation were omitted from the record on the first infestment. (3) Apparently "the amount of the principal sum" must be specified in the bond, for otherwise it would be impossible to determine on the terms of the deed whether the Act was or was not complied with. (4) The amount of the principal being stated at £1000 in the limitation clause, and that clause being excessive owing to an error clearly confined to interest, it is thought that the security for principal would be sustained.<sup>2</sup> (5) If the interest limit be overstated in the bond by, say £50, the heritable security for interest is bad *in toto*, and not merely as to the excess £50, and this is irrespective of the fact that principal and interest may never have exceeded £1150. But as to points (4) and (5), a much more severe view, fatal to the security *in toto*, may be deduced from the opinion of Lord Guthrie in *Anderson v. Dickie*.<sup>3</sup> (6) Assuming that the principal credit is specified, it is not necessary that £1150 (or any smaller "certain definite sum") shall be stated in the bond; it is enough to say "the said sum of £1000 and three years' interest thereon at the rate of 5 per cent. per annum."<sup>4</sup> (7) On the other hand (the principal credit being specified), it is enough to say that "principal and interest as against the heritage shall never exceed £1150," without any reference to three years or 5 per cent. (8) If the debt becomes £1100 principal advanced, and £50 interest, the excess £100 of principal is not secured, though the total does not exceed £1150. (9) Accumulated interest is principal.<sup>5</sup> (10) The three years' interest at 5 per cent. is merely a measure, and in particular there is no rule that, as against the heritable security, interest

<sup>1</sup> 19 & 20 Vict. c. 91, s. 7.

<sup>2</sup> *Alston v. Nellfield Co.*, 1915 S.C. 912.

<sup>3</sup> 1914 S.C. 706.

<sup>4</sup> *Morton v. Hunter & Co.*, 1828, 7 S. 172; affd. 4 W. & S. 379.

<sup>5</sup> *Reddie v. Williamson*, 1863, 1 M. 228.

on a cash credit cannot exceed 5 per cent. or three years; thus one year's interest at 15 per cent. or six years' interest at  $2\frac{1}{2}$  per cent. would both be secured. (11) The limitation applies only to "principal and interest," and there is nothing to prevent other obligations in the deed being effectual against the heritage, provided they comply with ordinary legal rules, *e.g.* penalties (for what they cover), and definite sums for life premiums. (12) The limitation does not apply to the personal obligations or to security over personal estate though contained in the same deed.

**813.** An inhibition does not prevent operations on a cash credit secured on heritage.<sup>1</sup>

#### SECTION 13.—ASSIGNATION OF BOND FOR CASH CREDIT.

**814.** The generally received opinion is that a cash credit bond can be assigned only to the extent of the balance due at the date of the assignation, and as a fixed debt, and not as transferring the creditor's part of a really operative account so as to authorise future dealings with the security constituted by the bond. The assignation will be accompanied by a stated account and certificate in terms of the bond.

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<sup>1</sup> *Campbell's Tr. v. De Lisle's Exrs.*, 1870, 9 M. 252.



## BONDING OF GOODS.

*See* WAREHOUSING

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## BOND OF PRESENTATION.

*See* IMPRISONMENT FOR DEBT.

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## BOND OF RELIEF.

*See* CAUTIONARY OBLIGATIONS.

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## BOND OF RESPONDENTIA.

*See* MARITIME LIENS.

# BONUS.

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## SECTION 1.—INTRODUCTORY.

815. The term bonus first became current among lawyers about the end of the eighteenth century in relation to questions arising between the liar and liferenter of bank stock. Professor Bell appears to be the only institutional writer in whose works bonus is specifically mentioned.<sup>1</sup> At the present day, periodic or occasional payments distributed out of profits by banks and other financial and commercial companies to their members, or by employers to their employees, are generally referred to as bonus, where they are extra or additional to some normal or standard payment contracted for.

816. Bonus is in the nature of a gratuity. Where, in the liquidation of a company incorporated by registration under the Companies Acts, the allottees of bonus shares were settled on the list of contributories, a transferee for value pleaded that he was registered as a purchaser without notice of liability, and that the liquidator and company were estopped from denying in a question with him that the shares were fully paid up. The share certificates were crossed "Bonus," and in holding that the transferee had notice of liability thereby, the Court (Stirling J.) adopted from the New English Dictionary the following as a definition of bonus, viz. : "A boon or gift over and above what is nominally due as remuneration to the receiver, and which is therefore something wholly to the good."<sup>2</sup> The term bonus has, however, sometimes been used in commerce to denote interest stipulated for the use of money.<sup>3</sup>

817. Bonus is also in the nature of an accessory, the title to receive it when given being in the person entitled to the principal right. Thus, where a policy of assurance was allowed to lapse for a year and was then renewed on the same terms for the same amount, the executors of the assured were held not entitled, in a question with the company, to

<sup>1</sup> Bell, Prin., 4th ed., s. 1050.

<sup>2</sup> *Eddystone Marine Insurance Co., Ltd.*, [1894] W.N. 30.

<sup>3</sup> *Arizona Copper Co. v. Surveyor of Taxes*, 1891, 19 R. 150.

a bonus declared anterior to the lapse.<sup>1</sup> And the executors of an assured could not recover from the company a bonus declared after the death of the assured.<sup>2</sup>

## SECTION 2.—CAPITAL OR INCOME.

### SUBSECTION (1).—*On Bank Stocks.*

**818.** Where a bank, whose authorised capital is limited under its constitution at a fixed maximum, accumulates its profits and employs them as a floating capital laid out in bills and other negotiable securities, any extraordinary dividend or bonus distributed therefrom among the bank's stockholders is a payment of capital, and is not carried from the stockholder by his assignation of the stock in liferent for liferent use only.<sup>3</sup> The refusal of the Court to regard such payments as falling to the liferenter proceeded on the grounds (*a*) that a liferenter is by his title excluded from the enjoyment of profits accruing to the subject liferented before the commencement of the liferent right; and (*b*) that an inquiry as to what proportion of the bonus accrued as profit prior to the commencement of the liferent right would lead to inconveniences to the bank which would be intolerable.<sup>4</sup> The rule that such accumulated profits are to be regarded as capital and not as income is thus an artificial one, but is well established where it applies.<sup>5</sup>

**819.** A mere extra payment or increase in the rate of dividend on bank stock, however, does not necessarily represent a payment of capital, it being essential to shew that the extra payment was made out of accumulated profits. Where the rate of dividend was increased from  $2\frac{3}{4}$  per cent. to 3 per cent. in 1781, from 3 per cent. to  $3\frac{1}{2}$  per cent. in 1788, and from  $3\frac{1}{2}$  per cent. to 5 per cent. in 1807, the Court held the whole 5 per cent. dividend to be income on the ground that its increase was not shewn to have been occasioned by the application of any interest and profits different in their nature from the interest and profits which occasioned the earlier increases, which had been treated as income by the parties to the action.<sup>6</sup> A bank in declaring the ordinary half-yearly dividend at  $3\frac{1}{2}$  per cent. declared in addition thereto a bonus out of the interest and profits at 1 per cent. on the capital stock. The Court held that the whole  $4\frac{1}{2}$  per cent. was income, there being nothing to indicate that the 1 per cent. was paid out of accumulated profits.<sup>7</sup>

<sup>1</sup> *Windus v. Tredegar*, 1866, 15 L.T. 108.

<sup>2</sup> *Rosmead v. Norwich Union Life Insurance Society*, [1898] 15 T.L.R. 9.

<sup>3</sup> *Brander v. Brander*, 1799, 4 Ves. jun. 800 (Bank of England); *Irving v. Houstoun*, 1803, 4 Pat. App. 521 (Bank of Scotland).

<sup>4</sup> See Lord Watson's speech explaining *Irving v. Houstoun* in *Bouch v. Sproule*, 1887, L.R. 12 App. Cas. 385.

<sup>5</sup> *Paris v. Paris*, 1804, 10 Ves. 185; *Clayton v. Gresham*, 1804, 10 Ves. 288; *Witts v. Steere*, 1807, 13 Ves. 363; *Ex parte Hodgkins, re Hodgkins*, 1847, 11 Ir. Eq. 99. Cf. also *Bouch v. Sproule*, 1887, L.R. 12 App. Cas. 385, where the bank bonus cases are reviewed and explained by Lords Herschell and Watson.

<sup>6</sup> *Barclay v. Wainwright*, 1807, 14 Ves. 66, at p. 79.

<sup>7</sup> *Melville v. Preston*, 1848, 16 Sim. 163.

SUBSECTION (2).—*On Shares of Limited Companies.*

820. Where a limited company, with power under its constitution to increase its capital, distributes accumulated profits among its shareholders as bonus, there is no rule of law requiring such bonus to be treated as a capital payment. The question in such a case depends on the real nature of the transaction by which the company makes the distribution, and both the form of the transaction and the substance must be looked at.<sup>1</sup> Where the nature of the transaction contemplated is an increase of the company's issued shares, and involves that in the final result no money shall pass from the company, but that the entire sum distributed as bonus shall remain with the company as paid-up capital, the distribution is a distribution of capital whether or not an option is given to any shareholders to accept payment in lieu of an allotment of new shares.<sup>2</sup>

Where, however, the company distributes accumulated profits by declaring and paying a bonus dividend, the distribution is income notwithstanding that concurrently the company may have invited its shareholders to apply for an allotment of new shares.<sup>3</sup> It is for the company and not for the shareholder to stamp the bonus with the character of capital or income.<sup>4</sup>

821. In a liquidation, winding-up, or amalgamation, surplus profits which have never been declared as dividend by the company do not form income in a question between liferenter and fiar.<sup>5</sup> They remain assets only, and are not subject to income or super tax.<sup>6</sup>

The appropriation by the company of its surplus profits to capital or to dividend is binding on the shareholder and on those deriving title from him.<sup>7</sup> It is also binding in a question between the Inland Revenue and the shareholder in relation to the incidence of income and super tax.<sup>8</sup> But the terms of some of the Dominion Income Tax Acts are wide enough to attach bonus though it may have been distributed by the company as capital.<sup>9</sup>

SUBSECTION (3).—*On Policies of Assurance.*

822. Where under its constitution surplus profits of a life insurance company fall to be divided every five years, a bonus paid out at the

<sup>1</sup> *Bouch v. Sproule*, 1887, L.R. 12 App. Cas. 385.

<sup>2</sup> *Ibid.*; *Cunliff's Trs. v. Cunliff*, 1900, 3 F. 202; *Gunnis' Trs. v. Gunnis*, 1903, 6 F. 104; *Howard's Trs. v. Howard*, 1907 S.C. 1274.

<sup>3</sup> *Blyth's Trs. v. Milne*, 1905, 7 F. 799; *In re Northage*, [1891] 60 L.J., Ch. 488; *Malam v. Hitchens*, [1894] 3 Ch. 578.

<sup>4</sup> *In re Barton's Trust*, 1868, L.R. 5 Eq. 238; *Re Hopkins' Trust*, 1874, 43 L.J., Ch. 722; *Lugden v. Alsbury*, 1890, 45 Ch. D. 237, at p. 245; *In re Bridgewater Navigation Co.*, [1891] 2 Ch. 317.

<sup>5</sup> *Armitage v. Gurnet*, [1893] 3 Ch. 337.

<sup>6</sup> *Inland Revenue v. Burrell*, [1923] 2 K.B. 478.

<sup>7</sup> *Bouch v. Sproule*, 1887, L.R. 12 App. Cas. 385, dictum of Fry L. J., approved by Lord Herschell at p. 397. Cf. also *L. P. Dunedin in Blyth's Trs. v. Milne*, 1905, 7 F. 799, at p. 805.

<sup>8</sup> *Inland Revenue v. Blott*, [1921] 2 A.C. 171.

<sup>9</sup> *Swan Brewery Co. v. The King*, [1914] A.C. 231.



discretion of the management is income, and is liable to income tax, at least where the insurance company is a proprietary one and the profits distributed as bonus are derived from transactions with non-members of the company.<sup>1</sup> Where the bonus is added to the capital sum payable under the policy it is not income. Nor is it income liable to income tax when it is derived from profits arising out of mutual assurance between members only.<sup>2</sup>

#### SUBSECTION (4).—*On Salary or Wages.*

**823.** A bonus addition to salary or wages is income. War bonus given in the form of an increase of wages by reason of a general rise in the cost of living has been held to fall under the description "full civil pay."<sup>3</sup> It also falls within the description "emoluments."<sup>4</sup> Voluntary offerings to the incumbent of a benefice for his personal use have been held to be "profits accruing to him by reason of his office" in the sense of the Income Tax Acts.<sup>5</sup>

**824.** A bonus given by way of the extinction of a debt may be income of the person benefited though it has never been handled by him. Where it is given in the form of payment by an employer of the income tax due by his employee on salary or wages, the bonus is income of the employee in the sense of the Income Tax Acts, irrespective of whether the employer, having been specially assessed to income tax in respect of the offices and employment held under him, refuses to deduct the tax from the salary of his employee,<sup>6</sup> or of whether the employer gratuitously discharges the liability of the employee to the Inland Revenue.<sup>7</sup>

#### SECTION 3.—*To WHOM DUE.*

**825.** Where a right is assigned or transferred absolutely or subject to limitations, but without provision made for the disposal of bonus additions thereto, the question whether the cedent or assignee is entitled to bonus is one of intention to be gathered from the terms of the contract in reference to the circumstances under which bonus was declared. The bonus, being accessory, as a general rule follows the principal right.

#### SUBSECTION (1).—*Capital Bonus.*

**826.** An assignation of the sum insured under a policy of assurance carries the bonus additions thereafter accruing on the capital sum.<sup>8</sup> Where a testator disposes of the sum in a policy of assurance on his life

<sup>1</sup> *Last v. London Assurance Corpn.*, 1885, L.R. 10 App. Cas. 438.

<sup>2</sup> *New York Life Insur. Co. v. Styles*, 1889, L.R. 14 App. Cas. 381.

<sup>3</sup> *Sutton v. Att. Gen.*, [1923] 39 T.L.R. 294; *Aylott v. West Ham Corporation*, [1926] 42 T.L.R. 284.

<sup>4</sup> *Salford Guardians v. Dewhurst*, [1926] A.C. 619.

<sup>5</sup> *Blakiston v. Cooper*, [1909] A.C. 104.

<sup>6</sup> *North British Ry. Co. v. Inland Revenue*, 1923 S.C. (H.L.) 27.

<sup>7</sup> *Hartland v. Diggines*, [1925] 1 K.B. 372. <sup>8</sup> *Gilly v. Burley*, 1856, 22 Beav. 619.

by bequeathing part of it as pecuniary legacies and by legating "the residue" without mention of bonus, the legacy of residue will include bonus additions accrued on the policy prior to the testator's death.<sup>1</sup> An assignation by a reversioner of the South Sea stock, to which he would become entitled on the death of a liferenter, and all his right, title and interest therein, was held to carry all bonus declared during the life of the liferenter subsequent to the date of the assignment.<sup>2</sup> But a legacy of a specific amount of bank stock does not carry with it a bonus declared after the date of the will but before the testator's death.<sup>3</sup>

827. In order to carry bonus, the assignation must be an assignation in fee. But it will be effective though the fee be limited,<sup>4</sup> or the term of payment postponed by the creation of a trust.<sup>5</sup>

#### SUBSECTION (2).—*Income Bonus.*

828. In the absence of special contract, the right to bonus as between cedent and assignee is governed by the like rules as are applicable to dividends, the bonus remaining with the cedent if accruing before the date of the transfer, and, if subsequent thereto, passing to the assignee. In succession a similar principle applies to regulate the apportionment between the specific legatee of shares and the residuary estate. Bonus declared after the testator's death goes to the legatee.<sup>6</sup> Bonus declared before his death falls into his residuary estate, even though the actual term of payment be subsequent to the date of death.<sup>7</sup>

829. The Apportionment Act, 1870, expressly applies to bonus in the nature of periodical payments whether usually made or declared at any fixed times or otherwise.<sup>8</sup> The maker of the bonus payment may effectively stipulate that the Act shall not apply.<sup>9</sup>

830. Where an employer undertakes to give his employees "full civil pay" while they are absent from his employment on war service, such an undertaking is sufficient to confer upon employees who accept war service the right to any war bonus given by the employer by way of addition to wage or salary in that grade of employment.<sup>10</sup> But where the employer undertakes only to give "the pay presently received" by his employees, such employees on accepting war service are not entitled to any war bonus given by way of addition to wages or salary in the grade of employment after the date of the undertaking.<sup>11</sup>

<sup>1</sup> *Corballis v. Corballis*, 1882, 9 L.R. Ir. 309.

<sup>2</sup> *In re Armstrong's Trusts*, 1857, 3 Kay & J. 486.

<sup>3</sup> *Norris v. Harrison*, 1817, 2 Madd. 268.      <sup>4</sup> *Cuming v. Cuming's Trs.*, 1824, 2 S. 743.

<sup>5</sup> *Ogilvie v. Cuming & Boswell*, 1852, 14 D. 363, *affd. Cuming v. Boswell*, 1856, 19 D. (H.L.) 7.

<sup>6</sup> *Maclaren v. Stainton*, 1861, 3 De G., F. and J. 202; *Bates v. Mackinlay*, 1862, 31 Beav. 280; *Dales v. Hayes*, 1871, 40 L.J., Ch. 24.

<sup>7</sup> *Lock v. Venables*, 1859, 27 Beav. 598; *Wright v. Tuckett*, 1860, 1 John. & H. 266.

<sup>8</sup> 33 & 34 Vict. c. 35, ss. 2 and 5; *Carr v. Griffith*, 1879, 12 Ch. D. 655.

<sup>9</sup> 33 & 34 Vict. c. 35, s. 7.

<sup>10</sup> *Sutton v. Atl. Gen.*, [1923] 39 T.L.R. 294; *Aylott v. West Ham Corporation*, [1926] 42 T.L.R. 284.

<sup>11</sup> *Shiels v. Mags. of Edinburgh*, 1926, S.N. 85 and 106.

## BOOKING OF PRISONER FOR DEBT.

*See* IMPRISONMENT FOR DEBT.

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## BOOKING, TENURE OF.

*See* BURGAGE.

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## BOOKS.

*See* EVIDENCE.

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## BOOKS OF ADJOURNAL.

*See* JUSTICIARY, HIGH COURT OF.

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## BOOKS OF COUNCIL AND SESSION.

*See* COURT OF SESSION; REGISTRATION OF DEEDS.

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## BOOKS OF SEDERUNT.

*See* COURT OF SESSION.

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## BORDER WARRANT.

*See* IMPRISONMENT FOR DEBT.

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# BORROWING POWERS.

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## SECTION 1.—INTRODUCTION.

**831.** The powers of public bodies created by Act of Parliament are limited by the statutes under which they are created. Such bodies are called into being for certain specific purposes, and beyond the sphere of these purposes their actings are *ultra vires* and null. As a general rule, therefore, no public body has power to borrow money unless such power is conferred on it by statute. In the course of the last century the change in the structure of society and the growing complexity of the machinery of government led to the creation of many local authorities, with diverse powers and duties. Most of these authorities were given power to borrow money for the purposes of the various statutes which regulated their functions.

## SECTION 2.—LOCAL AUTHORITIES LOANS ACTS.

**832.** The Local Authorities Loans (Scotland) Acts, 1891 and 1893,<sup>1</sup> conferred on local authorities power to raise money within the limits of their borrowing powers by the creation of redeemable stock in addition to the other modes of borrowing prescribed by the statutes applicable to them. Money may be raised in this way by any local authority having a statutory borrowing power. The expression local authority means any county council, town council, or other authority whatsoever having power to levy a rate as defined in the Acts.<sup>2</sup>

**833.** Stock is created by resolution of the authority, and may be issued at such price, being not lower than ninety-five per cent., and bearing

<sup>1</sup> 54 & 55 Vict. c. 34; 56 Vict. c. 8.

<sup>2</sup> 1893 Act, s. 2; 1891 Act, s. 4 (1).



such dividend as the authority may direct.<sup>1</sup> The resolution must specify after what period the stock thereby created is redeemable, and within what period it is to be redeemed and extinguished, and it must provide that the stock shall be redeemable at the option of the local authority at par.<sup>2</sup> The resolution does not take effect unless and until (1) it is confirmed at a subsequent meeting of the local authority, held after the resolution has been published in the prescribed manner, and after the expiration of the prescribed time, which must not be less than fourteen days after the first publication of the resolution, and (2) it is confirmed by the Secretary of Scotland.<sup>3</sup>

**834.** Stock so issued is redeemable in the option of the local authority at such time, not exceeding sixty years from the first creation of the stock, as the Secretary of Scotland may approve.<sup>4</sup> All stock ranks equally irrespective of the dates of its creation or issue, and it also ranks equally with all other securities of the local authority granted after the date of the first creation of stock.<sup>5</sup> It forms a charge on the whole revenues of the local authority, and the dividends are a charge thereon equally with the interest on all other securities of the local authority granted after the date of the first creation of the stock.<sup>6</sup>

**835.** For payment of dividends on stock, and for redemption and extinction or purchase and extinction thereof, local authorities are required to establish a fund, called the Consolidated Loans Fund, into which they are required to pay annually from their revenues sums sufficient to pay the dividends on stock issued by them, and to meet the amount payable in that year for redemption and extinction or purchase and extinction of the stock.<sup>7</sup> The Act further regulates the procedure to be observed by local authorities during the subsistence of the loans, and in issuing and extinguishing stock, and the schedule annexed contains the various forms applicable.

**836.** By the Forged Transfers Act, 1891,<sup>8</sup> local authorities which have issued shares, stock, or securities are empowered to make compensation by cash payment for any loss arising from a transfer of any such shares, stock, or securities in pursuance of a forged transfer. For the purpose of providing compensation, they may borrow on the same security, and subject to the same conditions as to repayment, as in the case of the securities in respect of which compensation is to be provided. Money so borrowed has to be repaid within a term not longer than five years.<sup>9</sup>

### SECTION 3.—PUBLIC WORKS LOANS COMMISSIONERS.

**837.** By the Public Works Loans Act, 1875,<sup>10</sup> a body of commissioners, styled the Public Works Loans Commissioners, was set up, whose main

<sup>1</sup> 1893 Act, s. 2.

<sup>3</sup> *Ibid.*, s. 6.

<sup>6</sup> *Ibid.*, s. 8.

<sup>9</sup> Sec. 1.

<sup>2</sup> 1891 Act, s. 5 (3) and (4).

<sup>4</sup> 1893 Act, s. 2.

<sup>7</sup> *Ibid.*, ss. 9 and 10.

<sup>10</sup> 38 & 39 Vict. c. 89.

<sup>5</sup> 1891 Act, s. 5 (2).

<sup>8</sup> 54 & 55 Vict. c. 43.

function is to lend, to any person having power to borrow, money issued in pursuance of the Act for any of the purposes mentioned in the first schedule thereof. The commissioners are unpaid, and they hold office during such period as is authorised by the Act appointing them.<sup>1</sup> In considering the propriety of granting a loan, the commissioners have regard to the sufficiency of the security for its repayment, and they must determine whether the work for which the loan is asked would be of such a benefit to the public as to justify a loan out of public money, having regard to the amount of money placed at their disposal by Parliament.<sup>2</sup> The terms on which loans may be granted, and the various powers and duties of the commissioners, are set forth in the Act and the various statutes amending it.

#### SECTION 4.—BORROWING POWERS OF VARIOUS STATUTORY BODIES.

##### SUBSECTION (1).—*County Councils.*

###### (i) *In General.*

**838.** The borrowing powers of a county council are exercised by a standing joint committee of the Commissioners of Supply and of the county council, consisting of not more than seven members of each body appointed by the Commissioners of Supply and the county council respectively at their annual meeting.<sup>3</sup> Under the Local Government (Scotland) Act, 1889, a county council may, with the consent in writing of the standing joint committee, signed by two members and the county clerk, borrow, on the security of any rate leviable by the county council, such sums as may be required for any of the following purposes :—

(a) For any purpose for which any authority, whose powers and duties are by that Act transferred to the county council, were authorised to borrow. The powers so transferred were the powers of the Roads Trustees under the Roads Act, 1878, the powers of a local authority under the Contagious Diseases (Animals) Act, 1878, and the powers of a local authority under the Public Health Acts.

(b) For any purpose for which the council is expressly authorised to borrow under the Act ; and

(c) For making advances for emigration or colonisation.<sup>4</sup>

**839.** No borrowing is competent, except as specially provided in the Act, without the consent of the standing joint committee, and before giving their consent the committee are bound to take into account representations made by any ratepayer. Loans must be repaid within such period not exceeding thirty years as the county council with the consent of the standing joint committee may determine in each case, and they must be paid off by equal yearly or half-yearly instalments of principal and interest, or by a sinking fund managed according to the

<sup>1</sup> 38 & 39 Vict. c. 89, s. 4.

<sup>3</sup> Local Government (Scotland) Act, 1889, § 52 & 53 Vict. c. 50, s. 18.

<sup>2</sup> *Ibid.*, s. 9.

<sup>4</sup> Sec. 67.

regulations laid down by the Secretary of Scotland.<sup>1</sup> If in any year the county council find it necessary to make payments in connection with current annual expenditure in anticipation of the rates applicable to the expenditure of such year, they may without any consent borrow on the security of such part of the rates as is still due and unreceived, but not to an amount greater than one-half of such rates. Until the loan is paid off they have no further power of borrowing in this way.<sup>1</sup>

(ii) *Roads and Bridges.*

**840.** A county council may borrow on the security of the road rate for the purposes of the Roads and Bridges Act, 1878.<sup>2</sup> In repaying such borrowing, they must pay interest thereon and sums to account of principal out of the rate. A county council may reborrow in order to pay off such a loan, but all the moneys borrowed must be repaid within fifty years. Under s. 4 of the Roads Act, 1920,<sup>3</sup> road authorities have power to order locomotives and wagons to be weighed, and if the weight is within the legal limits they are bound to make compensation for any loss due to delay caused by their order. They may borrow money for the purpose of paying such compensation.

(iii) *Contagious Diseases of Animals.*

**841.** Under the Diseases of Animals Act, 1894,<sup>4</sup> a local authority is empowered to borrow on the credit of the local rates money necessary for the purposes of the Act where the amount of the local rate for these purposes exceeds sixpence in the £, and in security may mortgage the local rates for any term not exceeding seven years. Where the amount exceeds or would exceed ninepence in the £, the Secretary of Scotland may, if he thinks fit, on the application of the local authority, extend the term of repayment to any period not exceeding fourteen years. County councils exercise this power of borrowing subject to the provisions of the Local Government Act, 1889, and the Public Works Loans Commissioners may advance the money on the recommendation of the Secretary of Scotland. The local authority may give as security for the loan, either with or separately from the local rate, the charges which they are authorised to make for wharfs, etc., provided under the Act, and any estates, revenues, or funds belonging to them and not otherwise appropriated; and in that case the limitations respecting the amount of the local rate and the term of years do not operate.<sup>5</sup>

(iv) *Public Health.*

**842.** In counties, the duties of a local authority under the Public Health Acts are undertaken by district committees when such committees

<sup>1</sup> Sec. 67,

<sup>2</sup> 41 & 42 Vict. c. 51.

<sup>3</sup> 10 & 11 Geo. V. c. 72.

<sup>4</sup> 57 & 58 Vict. c. 57, ss. 42 (1) and 62 (1).

<sup>5</sup> Local Government (Scotland) Act, 1889, 52 & 53 Vict. c. 50, s. 17; Public Health (Scotland) Act, 1897, 60 & 61 Vict. c. 38, s. 12.



exist, and where none exists by the county council.<sup>1</sup> Where, however, a power to borrow is conferred by the Public Health Act, that power is exercised by the county council alone; district committees have no power to borrow.<sup>1</sup>

**843.** Under the Public Health (Scotland) Amendment Act, 1891, and the Public Health (Scotland) Act, 1897, local authorities are empowered to impose a domestic water rate and a public water rate, and to borrow money on the security thereof. They may borrow for the following purposes:—

1. For the purpose of constructing, purchasing, or enlarging or reconstructing such works as are authorised by these Acts for providing a supply of water for the use of the inhabitants of a district. In security they may mortgage the special water assessments or the public health general assessments.<sup>2</sup>

2. For the purpose of acquiring, making, enlarging, or reconstructing sewers, or for the purpose of utilising sewage. In security they may mortgage the special sewage assessments where such exist or the public health general assessments.<sup>3</sup>

3. For the purposes of providing offices for the local authority, and providing and furnishing such permanent hospitals, disinfecting premises and apparatus, houses of reception or mortuaries, as are authorised in the Acts, on the security of the public health general assessments.<sup>4</sup>

4. For the purpose of providing institutions for the treatment of tuberculosis or any such other diseases as the Local Government Board with the approval of the Treasury may appoint, on the security of the general purposes rate as applied by s. 80 of the National Insurance Act, 1911.<sup>5</sup>

5. For the purpose of promoting the welfare of blind persons ordinarily resident in this area, or providing or maintaining or contributing towards workshops, hostels, homes, or other places for the reception of blind persons.<sup>6</sup>

6. For the purpose of establishing and maintaining depots for the sale of milk specially prepared for consumption by infants under two years of age. This power may only be exercised subject to the consent of the Local Government Board.<sup>7</sup>

(v) *County Buildings, etc.*

**844.** The justices of any county may borrow from the Loans Commissioners for the purpose of building, rebuilding, enlarging, repairing, improving, and fitting up any police station, and justices' room and offices connected therewith, or any of such purposes, on the security of the

<sup>1</sup> Local Government (Scotland) Act, 1889, 52 & 53 Vict. c. 50, s. 17; Public Health (Scotland) Act, 1897, 60 & 61 Vict. c. 38, s. 12.

<sup>2</sup> 60 & 61 Vict. c. 38, s. 140.

<sup>3</sup> *Ibid.*, s. 139.

<sup>4</sup> *Ibid.*, s. 141.

<sup>5</sup> Insurance Act, 1913, 3 & 4 Geo. V. c. 37, s. 41 (1).

<sup>6</sup> Blind Persons Act, 1920, 10 & 11 Geo. V. c. 49, ss. 2, 4.

<sup>7</sup> Milk and Dairies (Scotland) Act, 1914, 4 & 5 Geo. V. c. 46, s. 28.



county rates. Such borrowing is competent only where there is a majority of not less than five in favour of it.<sup>1</sup>

**845.** Subject to the provisions of s. 67 of the Local Government (Scotland) Act, 1897, a county council may borrow for the purpose of constructing and extending the county buildings, buildings for the transaction of the business of a district committee, and dwellings for constables and road workmen.<sup>2</sup> A county council is empowered to provide fire engines, etc., and on the security of the public health general assessment or the special district assessment to borrow for such of the purposes of that section as the Secretary of Scotland may prescribe.<sup>3</sup>

(vi) *Small Holdings.*

**846.** Under the Small Holdings Act, 1892,<sup>4</sup> a county council may borrow money for the purposes of the Act in accordance with the provisions of the Local Government (Scotland) Act, 1889, except that, notwithstanding anything in that Act, the money so borrowed shall be repaid in such period not exceeding fifty years as the council with the consent of the Secretary of Scotland may determine in each case.

(vii) *Housing.*

**847.** Under the Housing (Scotland) Act, 1925,<sup>5</sup> a county council may, with the consent of the Board of Health, borrow for the purposes of Part I. of the Act, so far as it relates to the execution of repairs and works by the county council and to compensation payable in respect of obstructive buildings, for the purposes of Parts II. and III., *i.e.* Improvement and Reconstruction Schemes and the Provision of Houses for the Working Classes, and for the purposes of making loans or advances, or of fulfilling any guarantee given by the local authority under the part of the Act dealing with financial provisions. Money so borrowed may be borrowed on the security of the public health general assessment rate in the same manner and subject to the same conditions, as nearly as may be, as apply to the provisions of permanent hospitals under the Public Health (Scotland) Act, 1897; and notwithstanding the provisions of s. 141 of that Act, the money so borrowed must be wholly repaid within such period not exceeding eighty years as the Board of Health may determine. To such borrowing the provisions of s. 67 of the Local Government (Scotland) Act, 1889, apply in so far as not inconsistent with the powers so conferred.<sup>5</sup>

**848.** By s. 69 of the Housing (Scotland) Act, 1925, a county council, in addition to any other statutory power to borrow, and subject to the provisions of s. 67 of the Local Government (Scotland) Act, 1889, may

<sup>1</sup> Public Works Loans Act, 1875, 38 & 39 Vict. c. 89, s. 40.

<sup>2</sup> Local Government (Scotland) Act, 1908, 8 Edw. VII. c. 62, s. 3.

<sup>3</sup> *Ibid.*, s. 8.

<sup>4</sup> 55 & 56 Vict. c. 31, s. 19.

<sup>5</sup> Housing (Scotland) Act, 1925, 15 Geo. V. c. 15, s. 68.

borrow for the purpose of making grants or loans to, or subscribing for, the capital of a public utility society under Part III. of the Act; and as respects money so borrowed the maximum period for repayment is fifty years. With the consent of the Board of Health, a county council may also borrow for the purpose of making loans to any local authority within their area under s. 69, and for the purpose of making advances or fulfilling any guarantee given by the county council under s. 75.

**849.** A county council which is carrying into effect a housing scheme approved under Part III. of the Act outside its own district may, subject to the approval of the Board of Health, borrow money for the purpose of defraying any expense incurred therewith, and that on the security of such assessment as the Board may designate.<sup>1</sup> With the consent of the Board of Health a county council may exercise its borrowing powers by issuing bonds either by itself or jointly with another local authority. It may borrow without the consent of the Board for the purpose of redeeming these bonds.<sup>2</sup>

(viii) *Ancient Monuments.*

**850.** A county council may borrow money for the purposes of the Ancient Monuments Consolidation and Amendment Act, 1913, as for the purposes of the Local Government (Scotland) Act, 1889.<sup>3</sup>

SUBSECTION (2).—*Town Councils.*

**851.** By s. 374 of the Burgh Police (Scotland) Act, 1892,<sup>4</sup> town councils are empowered to borrow on the security of the rates for the purposes of that Act, or for the repayment of previous borrowings, such sums as they shall deem necessary. Where in a burgh there is a common good according to the law and usage of Scotland, the town council may apply to the Secretary of Scotland to determine what amount they may borrow on the security of it, and the Secretary of Scotland may, after such inquiry as he deems proper, determine the amount; thereafter the town council is deemed to have a statutory borrowing power to that amount.<sup>5</sup>

**852.** No borrowing may take place till an estimate of the amount required has been laid before the council, or until three weeks<sup>6</sup> after public notice of the amount to be borrowed and the purpose to which it is to be applied. The proposal to borrow must then be disposed of at the next meeting of the Council, held not less than three weeks after the notice, and the sum to be borrowed must not exceed the amount advertised.<sup>7</sup> For the purpose of providing temporarily for current expenses under any public general Act between the commencement of

<sup>1</sup> Sec. 70.

<sup>2</sup> Sec. 71.

<sup>3</sup> 3 & 4 Geo. V. c. 32, ss. 21 (2) and 23 (2).

<sup>4</sup> 55 & 56 Vict. c. 55.

<sup>5</sup> Local Authorities Loans (Scotland) Act, 1891, 54 & 55 Vict. c. 34, s. 4 (3).

<sup>6</sup> Burgh Police (Scotland) Act, 1903, 3 Edw. VII. c. 33, s. 164 (2) v.

<sup>7</sup> Burgh Police (Scotland) Act, 1892, 55 & 56 Vict. c. 55, s. 374.

any financial year and the date when any assessment for that year is received, or of providing temporarily for the payment of any expenses which the town council are entitled to defray from moneys borrowed under any public general Act on the security of any assessment, a town council may borrow by temporary loan on the security of the assessments.<sup>1</sup>

**853.** The town council are required at their first annual meeting for assessment after such borrowing has taken place, provided the rate of assessment does not amount to the maximum, to lay additional assessments, such as to produce a fund of 3 per cent. on the sum borrowed and the interest thereon. This fund is required to be set aside and invested as a sinking fund for the repayment of the borrowing.<sup>2</sup> In providing a sinking fund the town council may, in their option, do so in the above manner, or they may annually or semi-annually, during a period of not more than thirty years, set apart such sums as with interest will be sufficient to pay off the whole principal and interest. In the case of temporary borrowing for current expenses, all the money must be repaid before the expiry of the year out of the assessments of that year. Every other sum borrowed under s. 49 of the Burgh Police (Scotland) Act, 1903, must be repaid not later than six months after the expiry of the financial year in which it was borrowed.<sup>3</sup>

**854.** Town councils have in general the same borrowing powers as county councils with respect to roads, public health, housing, the care of the blind, the provision of buildings for the transaction of their business, the maintenance and equipment of fire brigades, the preservation of ancient monuments, etc.

#### SUBSECTION (3).—*Parish Councils.*

##### (i) *Poorhouses.*

**855.** By s. 62 of the Poor Law (Scotland) Act, 1845,<sup>4</sup> a parish council is empowered to borrow money for the purpose of erecting new poorhouses, and for enlarging, altering, or repairing any existing poorhouse, on the security of the poor rates. The sum so borrowed must not in any case exceed three times the assessment for the preceding year. In the case of parishes with a population greater than 100,000, the parish council may, for the purposes of s. 62, borrow on the security of the rates such sum as they may find to be requisite, provided that the total of the sum so borrowed, together with the amount unpaid of prior loans, does not exceed three times the assessment for the year preceding such borrowing.<sup>5</sup> Before exercising this power to borrow, they must procure a certificate from the board of supervision certifying that they have duly made provision for charging the assessments with the proper proportion of principal and interest of any former sums borrowed.<sup>6</sup>

<sup>1</sup> Burgh Police (Scotland) Act, 1903, 3 Edw. VII. c. 33, s. 49.

<sup>2</sup> Burgh Police (Scotland) Act, 1892, 55 & 56 Vict. c. 55, s. 374.

<sup>3</sup> Burgh Police (Scotland) Act, 1903, 3 Edw. VII. c. 33, s. 49.

<sup>4</sup> 8 & 9 Vict. c. 83.

<sup>5</sup> Poor Law Loans and Relief (Scotland) Act, 1886, 49 & 50 Vict. c. 51, s. 1.

<sup>6</sup> *Ibid.*, s. 1 (3).



A parish council may also borrow money for the administration, maintenance, erection, or extension of buildings erected for the treatment of such pauper lunatics as they are authorised to receive and detain.<sup>1</sup>

**856.** By s. 38 of the Local Government (Scotland) Act, 1894,<sup>2</sup> a parish council may, with the consent of the Board of Health,<sup>3</sup> borrow money on the security of the special parish rate for purchasing any land or erecting any buildings which they are authorised to purchase or erect, and for any permanent work or other thing which they are authorised to execute or do, and the cost of which ought, in the opinion of the Board, to be spread over a term of years. So long as the loans owing by a parish council exceed one-fifth of the annual value of the lands and heritages within such parish, as ascertained for the purposes of the Poor Law (Scotland) Act, 1845, no further loan, other than a temporary loan in terms of s. 89 of that Act, may be raised by the parish council without the consent of the Board of Health.<sup>4</sup>

**857.** Loans raised under s. 62 of the Poor Law Amendment (Scotland) Act, 1845, and s. 27 of the Lunacy Acts (Scotland) Amendment Act, 1866, must be repaid by equal annual instalments of not less than one-thirtieth of the sum borrowed, exclusive of interest,<sup>5</sup> and no further borrowing is allowed until the whole of the money last borrowed, with interest, is paid off. Money raised under s. 28 of the Local Government (Scotland) Act, 1894, must be repaid by equal yearly instalments of principal and interest within forty years if raised for the purpose of purchasing land or erecting buildings, otherwise within such period not exceeding thirty years as the Board of Health may determine.

### (ii) *Poor Relief.*

**858.** Under s. 89 of the Poor Law (Scotland) Act, 1845,<sup>6</sup> if a parish council finds it necessary in any year to make disbursements for poor relief beyond the amount received of the assessment applicable to the expenditure of such year, it may borrow money on the security of such part of the assessment as is still due and unreceived, but not to an amount greater than one-half of such part, and till this loan is paid off no further borrowing on the security of future assessments is permitted. The borrowing powers of parish councils were extended by the Poor Law Emergency Provisions (Scotland) Act, 1921,<sup>7</sup> which enacted that, in addition to the power to borrow conferred by s. 89 of the Act of 1845, and notwithstanding anything in that section, parish councils might borrow on the security of the assessments, present and future, leviable for poor relief such sums as the Board of Health might approve,<sup>8</sup> and

<sup>1</sup> Lunacy Acts (Scotland) Amendment Act, 1866, 29 & 30 Vict. c. 51, s. 27.

<sup>2</sup> 56 & 57 Vict. c. 73.

<sup>3</sup> Scottish Board of Health Act, 1919, 9 & 10 Geo. V. c. 20, s. 4.

<sup>4</sup> Local Government (Scotland) Act, 1894, 56 & 57 Vict. c. 73, s. 38; and Scottish Board of Health Act, 1919, 9 & 10 Geo. V. c. 20, s. 4.

<sup>5</sup> Poor Law Amendment (Scotland) Act, 1856, 19 & 20 Vict. c. 117, s. 3.

<sup>6</sup> 8 & 9 Vict. c. 83.

<sup>7</sup> 11 & 12 Geo. V. c. 64.

<sup>8</sup> Sec. 2.



that sums so borrowed should be repaid within such period, not exceeding ten or, in exceptional cases, fifteen years,<sup>1</sup> as the Board of Health might determine. These loans are not reckoned in computing the total of borrowing for the purposes of statutory limit imposed by s. 38 of the Local Government (Scotland) Act, 1894.

(iii) *Burial Grounds.*

**859.** A parish council may borrow any money required for providing and laying out any burial ground under the Burial Grounds (Scotland) Act, 1855, and may charge the future assessments under the Act with the payment of such money and the interest thereon. In addition to the interest on money borrowed and unpaid, not less than one-twentieth of the principal sum borrowed must be paid off in every year until the whole is discharged.<sup>2</sup>

SUBSECTION (4).—*Education Authorities.*

(i) *Schools and Schoolhouses.*

**860.** Where an education authority requires to incur expense in providing or enlarging a schoolhouse or other premises or offices for the use of the authority, or a playground or recreation field, or in any works of improving or fitting up a schoolhouse, or such other premises, offices, playground or recreation field, which expense ought, in the opinion of the Education Department by reason of the permanent character of such works to be spread over a term of years, they may, with the consent of the Department, borrow money on the security of the education rate. Such borrowing must be repaid within fifty years either by equal instalments of capital and interest, or by the creation of a sinking fund.<sup>3</sup> For the payment of current annual expenditure an education authority may borrow temporarily on the security of the rate.<sup>4</sup>

(ii) *Schools for Blind and Deaf-Mute Children.*

**861.** An education authority may, with the consent of the Education Department, borrow for the establishment, building, alteration, and management of a school for the education of blind and deaf-mute children, and for the purchase of land required for such a school and the support of the inmates thereof.<sup>5</sup>

(iii) *Industrial Schools.*

**862.** An education authority may also borrow for the purpose of providing for the reception and maintenance of youthful offenders in

<sup>1</sup> Local Authorities Emergency Provisions Act, 1923, 14 & 15 Geo. V. c. 30, s. 3 (b).

<sup>2</sup> 18 & 19 Vict. c. 68, s. 27.

<sup>3</sup> Education (Scotland) Act, 1872, 35 & 36 Vict. c. 62, s. 45; Education (Scotland) Act, 1908, 8 Edw. VII. c. 63, s. 24 (1).

<sup>4</sup> *Ibid.*, s. 24 (2).

<sup>5</sup> Blind and Deaf Mute Children Act, 1890, 53 & 54 Vict. c. 43, s. 4, and 8 & 9 Geo. V. c. 48.

certified industrial schools, and for the establishment, building, alteration, enlargement, rebuilding, or management of such a school or the purchase of land for it.<sup>1</sup> In the case of reformatory schools the powers of the education authority are exercised by the county council or the town council.<sup>1</sup>

SUBSECTION (5).—*District Lunacy Boards.*

**863.** A district board may, with the consent of the Local Government Board, borrow for any of the purposes of the Lunacy Acts involving capital expenditure on the security of the assessments authorised by these Acts.<sup>2</sup> All such borrowing must be repaid by equal yearly instalments of principal within a period not exceeding sixty years from the date of borrowing, such period to be fixed by the Local Government Board with due regard to the nature of the expenditure and the probable time during which it will remain effective. The money may be borrowed at any rate of interest not exceeding 5 per cent.<sup>3</sup> Where payments are made by a district board in connection with annual expenditure in anticipation of the assessment, the board may borrow by way of temporary loan or on draft. Such borrowing must be repaid before any further borrowing on the security of the assessment takes place.<sup>4</sup>

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<sup>1</sup> Children's Act, 1908, 8 Edw. VII. c. 67, ss. 73, 132.

<sup>2</sup> Mental Deficiency and Lunacy (Scotland) Act, 1913, 3 & 4 Geo. V. c. 38, s. 68 (7).

<sup>3</sup> Mental Deficiency and Lunacy Amendment Act, 1919, 9 & 10 Geo. V. c. 85, s. 2.

<sup>4</sup> *Ibid.*, s. 3.

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## BOTTOMRY.

*See* MARITIME LIENS.

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## BOUGHT AND SOLD NOTE.

*See* AGENCY.

# BOUNDARIES AND FENCES.

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### SECTION 1.—BOUNDING TITLE.

#### SUBSECTION (1).—*Preliminary.*

**864.** In conveyance of lands in Scotland it has never been essential to define by measurements the subjects of transfer. A purchaser of Scottish heritage is not entitled to demand a deed incorporating a plan shewing the precise extent of the grant.<sup>1</sup> It is well-settled law that “a grant or conveyance of . . . lands . . . of a certain name . . . is a perfectly valid title without any detailed description whatever. This creates no practical difficulty in determining rights of property, for the right depends not on the title alone, but on possession following upon and by virtue of the title.”<sup>2</sup> Accordingly, in many Scots charters the dispositive clause refers to the estate transferred by a name or names, *e.g.* “the lands of A as possessed by” the disponent. On the other hand, some conveyancers in bygone days anticipated the modern tendency towards precision, and favoured what has long been known as a “bounding charter” or “bounding title.” Whatever their motives may have been, those practitioners frequently adopted nomenclature so elastic or ambiguous that not only the interpretation of the terms used to describe the boundaries but also the meaning of the expression “bounding charter” or “bounding title” itself became fertile sources of litigation.

<sup>1</sup> *Johnston's Trs. v. Kinloch*, 1925, S.L.T. 124.

<sup>2</sup> *Houldsworth v. Gordon Cumming*, 1910 S.C. (H.L.) 49, per L. Kinnear at p. 54.

SUBSECTION (2).—*How Constituted.*

**865.** Briefly stated, the result of decisions is that a bounding title is constituted by any means which either expressly or by implication limit the grant. Examples are: (1) Express boundaries (or boundary) stated in the deed; (2) a plan referred to as shewing the boundaries;<sup>1</sup> (3) boundaries on three sides and measurement;<sup>2</sup> (4) the specification of parish or county.<sup>3</sup> “The true question is whether the boundaries are specified, and, if they are, whether they can be identified.”<sup>4</sup> But *quære* as to the effect of an unbounded infeftment followed by a decree arbitral settling marches.<sup>5</sup> “Merkland” is not a bounding title.<sup>6</sup>

SUBSECTION (3).—*Effects.*

**866.** If the grant is truly a bounding title, no corporeal right of property can be acquired beyond the boundary, not even by full possession for the prescriptive period;<sup>7</sup> but incorporeal property rights, such as salmon fishings, may be so acquired;<sup>8</sup> and so may rights of servitude.<sup>9</sup>

**867.** To enable prescription to operate there must be (1) a title habile to found possession; and (2) the necessary possession following thereon. Where a claim is based on a bounding title *plus* twenty years’ possession beyond the boundary, so far from the title supporting the possession, a reference to the title at once brands the possession as unwarranted and vitious.<sup>10</sup> That, at least, is the case where the conditions are that a place easily recognisable has been chosen as a boundary and remains in its original state. Such conditions, however, are not always present; and in proportion as they fail, the force of a bounding title is endangered, and proof of possession becomes vital. Thus the position of the boundary may have altered; and though “a title will remain not the less a bounding title although every trace by which it was recognised has disappeared,”<sup>11</sup> yet proof must be resorted to, and that will always, in fact, give opportunity for evidence of possession telling with effect.

**868.** Further, the very nature of the boundary originally specified may be such as to necessitate, and indeed invite, proof of possession. Such cases are found where lands are said to be bounded by other lands identified either by their own general name or the name of their owner. When lands are “bounded by another subject, the precise extent or line of boundary of which subject is itself disputed, then evidence may be

<sup>1</sup> *North British Rly. Co. v. Magistrates of Hawick*, 1862, 1 M. 200.

<sup>2</sup> *Stewart, &c. v. Greenock Harbour Trs.*, 1866, 4 M. 283.

<sup>3</sup> *Hepburn v. Duke of Gordon*, 1823, 2 S. 525 (N.E. 459); *Gordon v. Grant*, 1850, 13 D. 1.

<sup>4</sup> *Reid, &c. v. M'Coll*, 1879, 7 R. 84.      <sup>5</sup> *Beaumont v. Lord Glenlyon*, 1843, 5 D. 1337.

<sup>6</sup> *Spence v. Earl of Zetland*, 1839, 1 D. 415.      <sup>7</sup> Bell, Prin., 738, and cases *ibi cit.*

<sup>8</sup> *Earl of Zetland v. Tennent's Trs.*, 1873, 11 M. 469.

<sup>9</sup> *Liston v. Galloway*, 1835, 14 S. 97; *Beaumont*, *supra*.

<sup>10</sup> *Mags. of St. Monance v. Mackie*, 1845, 7 D. 582.      <sup>11</sup> *Reid v. M'Coll*, 1879, 7 R. 84.



received in order to ascertain the latter boundary.”<sup>1</sup> In one case it was said that often there could not be a better boundary than the naming of the adjoining owner, but what was in the speaker’s contemplation was probably the line of the adjoining proprietor’s land, not as specified in his titles, but as evidenced to the world by physical objects and by possession.<sup>2</sup> A complete bounding title is one which specifies the boundaries on all sides. The specification of a boundary on any side has so far the same legal effect, but obviously, especially in the case of considerable estates, it may be difficult to determine the effect of partial bounding as regards a discontiguous pertinent.

**869.** Apparent exceptions exist to the rule that corporeal property cannot be acquired beyond the boundary. These, however, turn on the nature of the boundary as a shifting line. In one case<sup>3</sup> a piece of ground was feued as bounded “by the river Clyde at low water.” Thereafter the river receded more than 100 feet. It was held, in a question between superior and vassal, that the land thus gained belonged to the vassal.

**870.** Acquisition of incorporeal rights beyond the bounds is not inconsistent with a bounding title. “It does not follow that this bounded property may not have various servitudes. In fact, an estate, however bounded, must have some rights reaching beyond the bounds. It must, for instance, have a right of access. But why may it not have others?”<sup>4</sup> But two things must be established, viz.: (1) possession for the prescriptive period along with the principal subject;<sup>5</sup> and (2) the relation of a dominant tenement on the one hand, and a servitude right, and not an auxiliary right of property, on the other.<sup>6</sup>

## SECTION 2.—BOUNDARIES.

### SUBSECTION (1).—*Particular Terms.*

**871.** Some of the common terms employed to denote boundaries which have been judicially construed are:

#### *Interpretation.*

|                             |   |
|-----------------------------|---|
| Sea <sup>7</sup> . . .      | } Low-water mark of ordinary spring-tides, but reserving the public use of the foreshore. |
| Sea-shore <sup>8</sup> .    |   |
| Sea-beach <sup>9</sup> .    |   |
| Tidal river <sup>10</sup> . |   |

<sup>1</sup> *Davidson v. Mags. of Anstruther Easter*, 1845, 7 D. 342.

<sup>2</sup> *Reid, &c. v. M'Coll*, 1879, 7 R. 84.

<sup>3</sup> *Blyth's Trs. v. Shaw Stewart*, 1883, 11 R. 99.

<sup>4</sup> *Beaumont v. Lord Glenlyon*, 1843, 5 D. 1337, per L. Mackenzie at p. 1342.

<sup>5</sup> *Lord Advocate v. Hunt*, 1867, 5 M. (H.L.) 1.

<sup>6</sup> *Beaumont v. Lord Glenlyon*, *supra*.

<sup>7</sup> *Boucher v. Crawford*, 1814, F.C. 64; *Cadell v. Allan*, 1905, 7 F. 606.

<sup>8</sup> *Mags. of Culross v. Geddes*, 1809, Hume, 554.

<sup>9</sup> *Cameron and Gunn v. Ainslie*, 1848, 10 D. 446.

<sup>10</sup> *Todd v. Clyde Trs.*, 1840, 2 D. 357 and 2 Rob. 333.

|                           |   |   |
|---------------------------|---|---|
| Full sea . . .            | { | High-water mark of ordinary spring-tides. <sup>1</sup> Where, however, a feu was granted bounded by the sea flood, and the granter's own title did not expressly carry his right farther seaward, it was held that he had given out all he had, and that he could not interject himself between his vassal and the sea. <sup>2</sup>  |
| Sea flood . . .           |   |   |
| Flood mark . . .          |   |   |
| <i>Fluxum maris</i>       | { | These words constitute a bounding charter, the extreme boundary seawards being the low-water line of the foreshore. <sup>3</sup>  |
| Non-tidal river           |   | <i>Medium filum</i> . <sup>4</sup>  |
| Road . . .                | { | If a road is the boundary between two estates, there is a presumption for the <i>medium filum</i> . <sup>5</sup> But "bounded by a private road" excludes the road. <sup>6</sup> It is otherwise in the case of a public road. <sup>7</sup>   |
| Canal . . .               |   | Excludes both canal and towing-path. <sup>8</sup>   |
| March stones              | { | In the absence of natural features, the presumption is for a straight line between the stones. <sup>9</sup>   |
| Wall . . .                | { | The inside of the wall; the wall itself and <i>solum</i> thereof being excluded. <sup>10</sup> If the contrary is intended, the expression should be "together with the walls and the <i>solum</i> thereof."  |
| Mutual wall . . .         | { | It is usually laid down that the boundary is the <i>medium filum</i> of the <i>solum</i> , and that each proprietor has a right of property in the wall <i>ad medium filum</i> and an interest in the other half entitling him to prevent alterations. An alternative view is that the respective rights of exclusive property are bounded by the respective sides of the wall, and that <i>solum</i> and wall are held <i>pro indiviso</i> . But in either case the practical result is the same: neither proprietor can alter the wall. <sup>11</sup> |
| Lateral boundary, seaward | { | The rule, as regards both foreshore and salmon fishings, is that a line is to be drawn representing the average direction of the coast, and that from the land boundary a perpendicular is to be dropped on such line. The perpendicular is the boundary. <sup>12</sup>   |

<sup>1</sup> *Berry v. Holden*, 1840, 3 D. 205; *Mags. of St. Monance v. Mackie*, 1845, 7 D. 582; *Keiller v. Mags. of Dundee*, 1886, 14 R. 191.

<sup>2</sup> *Hunter v. Lord Advocate*, 1869, 7 M. 899.

<sup>3</sup> *Lord Advocate v. Wemyss*, 1899, 2 F. (H.L.) 1, per L. Watson at p. 11.

<sup>4</sup> *Gibson v. Bonnington Sugar Refining Co., Ltd.*, 1869, 7 M. 394, and cases *ibi cit.*

<sup>5</sup> *Wishart v. Wyllie*, 1853, 1 Macq. 389.

<sup>6</sup> *Argyllshire Commiss. of Supply v. Campbell*, 1885, 12 R. 1255.

<sup>7</sup> *Mags. of Ayr v. Dobbie*, 1898, 25 R. 1184.

<sup>8</sup> *Fleming v. Baird*, 1841, 3 D. 1015.

<sup>9</sup> *Ewing & Ors. v. Lennox & Anr.*, 1828, 6 S. 417; *Dalhousie's Tutors v. Minister of Lochlee*, 1890, 17 R. 1060.

<sup>10</sup> *Smyth v. Allan*, 1813, 5 Pat. 669.

<sup>11</sup> Rankine on Landownership (4th ed.), p. 636.

<sup>12</sup> *M'Taggart v. M'Douall*, 1867, 5 M. 534; *Keith v. Smyth, &c.*, 1884, 12 R. 66.

Lateral bound-ary in river estuary . { A similar rule, but the first line is drawn to represent the average direction of the *medium filum* of the whole channel (both salt and fresh water) at ebb tide.<sup>1</sup>

Numerous other illustrations appear in the reports; but the decisions depended on specialties, and as they are fully dealt with by one of the leading text-writers,<sup>2</sup> it is unnecessary to discuss them here.

SUBSECTION (2).—*Conflict between Boundaries and Measurement.*

872. Where boundaries and plan conflict but measurements are given, the boundaries or plan will be preferred according as the one or the other is supported by the measurements.<sup>3</sup> Ordinarily, where expressly stated boundaries and measurements are contradictory, the rule of contract between seller and purchaser is, that “if the measurement is taxative, or is an essential of the contract, there is right to resile if there is substantial error in extent”;<sup>4</sup> it is otherwise if the measurement is descriptive merely.<sup>5</sup> In competition of titles, if the measurement would give a larger area than the boundaries, and these are clear, it is difficult to see how more than the boundaries could be claimed.<sup>6</sup> Conversely, if the boundaries are clear, the measurement will not limit<sup>7</sup> unless expressly taxative.

SUBSECTION (3).—*Ad medium filum.*

873. Where the march between two properties is a non-navigable river, a road, or a ditch, each owner is presumed to possess the *solum* of his estate *ad medium filum*, i.e. up to an imaginary line or thread drawn through the centre of the river, road, or ditch.<sup>8</sup> The extent of either property does not affect this presumption. But the proprietary right, in any case, is restricted. Thus, if a road or street be the march, the use of the surface is public, and the proprietor’s right usually takes the shape of a claim to the underground minerals. On the other hand, if a running stream separates two estates, the use to which the coterminous proprietors may put the *solum* is qualified—mainly owing to the fact that they have a common interest in the water of the stream, with the natural flow of which they are not entitled to interfere by erecting an *opus manufactum* in the *alveus*.<sup>9</sup> Where the *alveus* between the banks

<sup>1</sup> *Laird v. Reid et c contra*, 1871, 9 M. 699, 1009; *Gray v. Flemings and Richardson*, 1885, 12 R. 530.

<sup>2</sup> Rankine on Landownership, chap. vi. (4th ed.), pp. 101–111.

<sup>3</sup> *N.B. Rly. Co. v. Moon’s Trs.*, 1879, 6 R. 640.

<sup>4</sup> *Hepburn v. Campbell*, 1781, Mor. 14168; *Gray v. Hamilton*, 1801, Mor. App. “Sale,” No. 2.

<sup>5</sup> *Hannay v. Bargaly’s Creditors*, 1785, Mor. 13334; *Brown v. Kyd*, 1813, Hume, 700.

<sup>6</sup> *Currie v. Campbell’s Trs.*, 1888, 16 R. 237.

<sup>7</sup> *Douglas v. Lyne*, 1630, Mor. 2262; *Currie v. Campbell’s Trs.*, *supra*, per L. Young at p. 240.

<sup>8</sup> *Wishart v. Wyllie*, 1853, 1 Macq. 389.

<sup>9</sup> *Bicket v. Morris*, 1866, 4 M. (H.L.) 44; *Earl of Zetland v. Tennent’s Trs.*, 1873, 11 M. 469; *Campbell v. Muir*, 1908 S.C. 387.

of a river is divided by an island into a main and subsidiary channels (the latter being at times dry), the *medium filum* of the river is the centre line of the *alveus* from bank to bank, and not the centre line of the main stream.<sup>1</sup> A boundary "by" a road is different from a boundary "by" a stream: as, in the former case, every part of the road is excluded; in the latter, the property in the *alveus* up to the *medium filum* is carried.<sup>2</sup>

### SECTION 3.—MARCHES AND MARCH FENCES.

#### SUBSECTION (1).—General.

**874.** "March fence" is a *nomen juris* not known to the common law, but introduced by statute.<sup>3</sup> Prior to 1661 there existed no such thing in Scotland as actual fences between coterminous estates, and, necessarily, there existed no law with reference thereto.<sup>4</sup> By the Act of that year, entitled an "Act for Planting and Inclosing of Ground," it was provided, after sundry provisions for the encouragement of planting, "That where Inclosures fall to be upon the border of any person's Inheritance, the next adjacent Heritor shall be at equal pains and charges in Building, Ditching, and Planting that Dike which parteth their Inheritance."<sup>5</sup> By the Act 1669, c. 17, "anent inclosing of ground" (ratified by the Act 1685, c. 39), it is provided: "That whensoever any person intends to inclose by a Dike or Ditch upon the march betwixt his Lands and the Lands belonging to other Heretors contiguous thereunto, it shall be leisom to him to require the next Sheriffs . . . or other Judges Ordinar, to visit the marches along which the said Dike or Ditch is to be drawn, who are hereby authorised when the said marches are uneven or otherways incapable of Ditch or Dike to adjudge such parts of the one or other Heretor's ground, as occasion the inconveniency betwixt them, from the one Heretor in favours of the other, so as to be least to the prejudice of either party, and the Dike or Ditch to be made to be in all time thereafter the common march betwixt them, and the parts so adjudged *respective* from the one to the other being estimate to the just avail and compensated *pro tanto*, to decern what remains uncompensated of the price to the party to whom the same is wanting; and it is hereby declared that the parts thus adjudged, *hinc inde*, shall remain and abide with the lands or tennandries to which they are *respective* adjudged as parts and pendicles thereof in all time coming." These Acts are for the protection of plantations and other ground on which labour has been expended; the benefit of them was extended to all lands by the Act 1686, c. 11, entitled "Act for Winter Herding."

<sup>1</sup> *Menzies v. Breadalbane*, 1901, 4 F. 55.

<sup>2</sup> *M'Intyre's Trs. v. Mags. of Cupar Fife*, 1867, 5 M. 780; *Gibson v. Bonnington Sugar Refining Co., Ltd.*, 1869, 7 M. 394; Bell, Prin., s. 1120; Bell, Com., 602; Rankine on Land-ownership (4th ed.), pp. 106, 110, 281. See also *Darling's Trs. v. Cal. Rly. Co.*, 1903, 5 F. 1001; *Meacher v. Blair Oliphant*, 1913 S.C. 417.

<sup>3</sup> 1661, c. 41; 1669, c. 17; 1685, c. 49; 1686, c. 11.

<sup>4</sup> *Strang v. Stewart*, 1864, 2 M. 1015, per L. J.-C. Inglis at p. 1030.

<sup>5</sup> Stair, ii. 3, 75; Ersk. ii. 6, 4.



SUBSECTION (2).—*Definition of March Fence.*

**875.** Primarily, a “march fence” means the fence erected on the boundary line between two adjacent estates at the mutual expense of the adjoining proprietors under these statutes. “But without applying to the Sheriff, heritors may agree and contract with each other to erect a fence upon their properties at the mutual expense. And where such march fence in the one way or the other has been erected, it will follow as a consequence that it must be maintained at the mutual expense. Further, it may be that without express agreement or contract a march wall . . . . has for time immemorial been . . . . treated as if it had originally been erected under the statutes or under express agreement, and then by implied contract the same obligations may attach to the heritors or to their successors in their several properties.”<sup>1</sup>

SUBSECTION (3).—*Erection of March Fences.*

**876.** The Acts only apply to proprietors. Accordingly, where a crofter under the Crofters Holdings (Scotland) Act, 1886,<sup>2</sup> sought to have his landlord ordained under the Act 1661, c. 41, to bear half the expense of erecting a march fence between the croft and the landlord’s adjoining property, it was held (1) that the Act only applied to proprietors, and (2) that a crofter was not a “proprietor” in the sense of the Act.<sup>3</sup> Where a march fence had fallen into such disrepair that a man of skill reported that it required to be rebuilt, and in a different manner, it was held that the Sheriff had power, in a petition for the repair of the fence under the Act 1661, c. 41, to order it to be rebuilt, and to approve an alteration in the style of the fence which experience recommended.<sup>4</sup> On the other hand, it was held that the Court were not entitled, in a petition under the Act 1661, c. 41, for compelling the coterminous proprietor to bear half the expense of a march fence, to straighten the marches.<sup>5</sup> The Act 1669, c. 17, does not apply (1) where there is a natural boundary of steep cliffs, minimising the danger of trespass, and (2) where the cost of erecting the fence would be out of proportion to the value of the ground which the fence was to benefit.<sup>6</sup>

**877.** The march line between two neighbouring estates is the common property of the adjoining heritors,<sup>7</sup> and therefore one proprietor cannot set up march stones on that line unless either with the consent of the coterminous proprietor or under judicial sanction.<sup>8</sup>

<sup>1</sup> *Strang v. Stewart*, *supra*, per L. Cowan at p. 1024; *affd.* 4 M. (H.L.) 5. (For an historical discussion of this subject, see Rankine on Landownership, 4th ed., pp. 610, 638.)

<sup>2</sup> 49 & 50 Vict. c. 29.

<sup>3</sup> *MacDonald v. Dalgleish*, 1894, 21 R. 900.

<sup>4</sup> *Paterson v. MacDonald*, 1880, 7 R. 958.

<sup>5</sup> *Pollock v. Ewing*, 1869, 7 M. 815.

<sup>6</sup> *Lord Advocate v. Sinclair*, 1872, 11 M. 137.

<sup>7</sup> *Lockhart v. Seivewright*, 1758, Mor. 10488.

<sup>8</sup> *Stewart v. Sangster*, 1849, 11 D. 1176.

SUBSECTION (4).—*Perambulation of Marches.*

**878.** The old action upon a brieve of perambulation, which had for its purpose the determination of controverted marches, was regulated by the Act 1579, c. 79. The tenor of the brieve of perambulation, or precept directed to the Sheriff, is stated by Stair.<sup>1</sup> An action of this kind, in its purpose and effect, was closely akin to an action of molestation. The distinction between the two actions was, as stated by Erskine, that the action upon a brieve of perambulation was used where there was no dispute concerning the possession of the lands, and where the only question between the parties related to a point of right; whereas, in an action of molestation, the pursuer laid his plea on possession and secured the continuance of his possession of the lands, until the point of right was determined.<sup>2</sup> Both actions are now in disuse, as their object can now be readily attained, in regard to the question of possession, by interdict, or, in regard to the question of right, by declarator.

SUBSECTION (5).—*Planting and Enclosing of Lands.*(i) *Planting.*

**879.** For the encouragement, and, indeed, enforcement, of the plantation of lands, a large number of Acts, commencing so far back as 1424, were passed by the Scots Parliament; and the series was continued by the British Parliament down to 1773, the last being 13 Geo. III. c. 33. These are all obsolete or repealed. As regards entailed estates, the policy of these Acts has been perpetuated in the Montgomery Act, 1770,<sup>3</sup> and the Entail Amendment Act, 1875.<sup>4</sup> By s. 9 of the former Act, among the "Montgomery Improvements," which it is declared highly beneficial to the public to encourage proprietors to lay out money upon, there is included "enclosing, planting, or draining"; and heirs of entail in possession are accordingly permitted to lay out money thereupon, and charge the same under the Act. By the later Act it is provided by s. 3 that "improvements" (for the charging of which the Act makes amended provision) "shall include . . . (3) the enclosing of land and the straightening of fences and redivision of land: and . . . (6) the trenching of land, the clearing of land, or the planting of land." So far as the provisions of the older Acts were directed to the punishing of damage to plantations, their object is now sufficiently attained by the common law of malicious mischief.<sup>5</sup>

(ii) *Enclosing at Common Law.*

**880.** At common law there was no obligation upon a proprietor to co-operate with his neighbour in erecting suitable fences between their

<sup>1</sup> iv. 3, 14.<sup>2</sup> Stair, iv. 27; Ersk. iv. 1, 48; Bankt. i. 281.<sup>3</sup> 10 Geo. III. c. 51.<sup>4</sup> 38 & 39 Vict. c. 61.<sup>5</sup> *Mackay v. Patrick*, 1882, 10 R. (J.) 10.

lands. Even the negative obligation of abstaining from trespass, and preventing the trespass of one's cattle, seems to have been confined—at least as regards the latter—to cases where it was necessary for the protection of artificial crops in “haining time while the corns are upon the ground.”<sup>1</sup> In the case of waste land, and even in that of cultivated lands at other times of the year, it lay with the owner to protect himself by turning off his neighbour's cattle without hurt. The Act 1686, c. 11, required cattle to be herded the whole year . . . “so as they may not eat or destroy their neighbour's ground, woods, hedges, or planting.” This statute is still in observance.<sup>2</sup>

(iii) *Enclosing under Act 1661, c. 41.*

881. The portion of the Act 1661, c. 41, quoted above<sup>3</sup> is still operative, the remainder having been repealed by the Statute Law Revision (Scotland) Act, 1906.<sup>4</sup> Under the Act “All Lords, Sheriffs, and Bailies of regalities, Stewarts of Stewartries, and Justices of Peace, Bailies of Burghs, and other Judges whatsoever,” are charged with its enforcement—a clause under which it has been held that applications under the Act may competently come before the Court of Session.<sup>5</sup> The statute provides that the enclosing is to be done “upon the equal charges of the liferenter and heritor.” It has, however, it is understood, come to be the practice to charge the estate with the expense.<sup>6</sup> “Burgh and incorporate acres” are excluded from the Act; and it has been held that its tenor shows that it was meant to apply to landward estates only.<sup>7</sup> It seems also inapplicable except where mutual (not necessarily equal) advantages would accrue to the proprietors.<sup>8</sup>

882. So, too, where the march is a stream of sufficient size to exclude trespass in ordinary seasons, an application under the Act probably will not be granted.<sup>9</sup> In the case of a smaller stream the Act was regarded as applicable, the fence being erected either entirely on the petitioner's side of the water, or, in the objector's option, partly within and partly without the water, the petitioner being entitled, whichever method was chosen, to have suitable access for watering.<sup>10</sup> But in a recent case<sup>11</sup> it was decided that where the division between two properties is the *medium filum* of a stream, one of the proprietors cannot apply under the Act 1661, c. 41, for the erection of a march fence at the joint cost of himself and his neighbour. In this case the Lord President

<sup>1</sup> Stair, ii. 3, 67.

<sup>2</sup> *M'Arthur v. Miller*, 1873, 1 R. 248.

<sup>3</sup> Para. 874, *supra*.

<sup>4</sup> 6 Edw. VII. c. 38.

<sup>5</sup> *Pollock v. Ewing*, 1869, 7 M. 815.

<sup>6</sup> Rankine on Landownership (4th ed.), p. 614.

<sup>7</sup> *Penman v. Douglas*, 1739, Mor. 10481.

<sup>8</sup> *Earl of Peterborough v. Garioch*, 1784, Mor. 10497; *Lord Advocate v. Sinclair*, 1872,

11 M. 137. Cf. *Secker v. Cameron*, 1914 S.C. 354.

<sup>9</sup> Rankine on Landownership (4th ed.), p. 615; *Graham v. Irving*, 1899, 2 F. 29.

<sup>10</sup> *Earl of Crawford v. Rig*, 1669, Mor. 10475; *Pollock v. Ewing*, *supra*.

<sup>11</sup> *Graham v. Irving*, *supra*.



(Balfour) treated the earlier cases as proceeding on a liberal construction of the Act of 1661, which could only be justified on the view that the streams dealt with in these cases were negligible in size, and held that these cases could not be followed to the effect of stretching the Act to cover the case of such a stream as that then in question, which was 42 feet wide. Lords Adam and Kinnear concurred in this view; but Lord M'Laren dissented, thinking that the older decisions had settled the interpretation of the Act in a contrary sense—a sense which, however, he agreed, would not have commended itself to him had the matter arisen before him for the first time.

**883.** The Court has not power to straighten the marches in an application under this Act, but ought to do as little as circumstances permit to alter the possession. As regards the style of fence, it will take expert opinion as to what is most suitable in the whole circumstances. In some early cases difficulty arose as to the application of the Act where a portion of the boundary between the lands was not of a nature suitable for the erection of a fence, and yet such at the same time as to impose no sufficient obstacle to trespass. This difficulty, and probably also a keen sense of the public advantage of making provision for the straightening of crooked marches, led the Scots Estates to legislate further on the matter of enclosing and straightening marches.<sup>1</sup>

#### SUBSECTION (6).—*Straightening of Marches.*

**884.** As with the Act of 1661,<sup>2</sup> so with that of 1669, it is essential, in order that the provisions may be enforced, that there be reasonable mutuality of advantage,<sup>3</sup> reasonable necessity for a fence and for straightening the march, and reasonable proportion between the expenditure involved in maintenance and erection and the value of the lands.<sup>4</sup> In the last case cited, proof was allowed apparently as to these points. An argument that the Act of 1661, having for its object the encouragement of planting of trees, and agriculture and cattle breeding, could not be called in aid where the object of desiring the lands fenced was to render them better fitted for game preserving, was rejected by the Lord Ordinary (Salvesen) as untenable; and he expressed approval of the view stated by Mr. Rankine that “the Act applies to march fences in every sort of locality in which a fence is actually required, whatever be the nature of the boundary.”<sup>5</sup> Similarly, it was held that conversion by one proprietor of his lands into a deer forest did not free the adjoining owner from his obligation to contribute to the upkeep of the march fence.<sup>6</sup> In another case it was held, however, that the erection of a

<sup>1</sup> Act 1669, c. 17. Cp. *Earl of Crawford v. Rig*, 1669, Mor. 10475.

<sup>2</sup> 1661, c. 41. <sup>3</sup> *Secker v. Cameron*, 1914 S.C. 354.

<sup>4</sup> *Earl of Cassillis v. Paterson*, 28th Feb. 1809, F.C.; *Lord Advocate v. Sinclair*, 1872, 11 M. 137; cf. *Scott v. Duke of Argyll*, 1907 (O.H.), 14 S.L.T. 829. But see Ersk. i. 4, 3, and ii. 6, 4. (Lord Ivory's notes.)

<sup>5</sup> Rankine on Landownership, p. 615.

<sup>6</sup> *Blackburn v. Head*, 1903 (O.H.), 11 S.L.T. 521.



fence was not proved to be beneficial or necessary to the estate of the defender, who maintained that the cost of erection would be out of all proportion to the benefit which would result.<sup>1</sup>

**885.** In the course of rectifying the boundaries, a transference of land very considerable as compared with the whole area involved is competent. Thus the terms of the Act were not exceeded by adjudging a piece of land three and a half acres in extent from one heritor to another adjoining.<sup>2</sup> It is, moreover, not a sufficient objection that the march is not actually *straightened*, provided the line selected be in point of fact that which convenience dictates.<sup>3</sup> In questions of disputed title marches, weight will be given, in the absence of positive proof, to the real evidence prescribed by the natural features of the ground.<sup>4</sup> As regards title to appear in such proceedings, a tenant may object although the landlord is agreeable.<sup>5</sup> Entail is no bar to proceedings under the Act, but if there be a surplus, it behoves to be tailzied or employed upon the land.<sup>6</sup> The procedure laid down in the Act directing the Sheriff to visit the march is imperative, and cannot be dispensed with even by the consent of parties to remit to a man of skill, although the Sheriff is personally acquainted with the locality.<sup>7</sup> It has never definitely been decided whether the judgment of the Sheriff is subject to review on the merits.<sup>8</sup>

SUBSECTION (7).—*March Fences originating otherwise than by Statute.*

**886.** It is a mistake to suppose that the origin of a march fence must necessarily be traceable to one or other of the statutes just cited. “Without applying to the Sheriff, heritors may agree and contract with each other to erect a fence upon their properties at the mutual expense. Farther, it may be that, without express agreement to a contract, a march wall or other fence by which adjoining properties are *de facto* divided has from time immemorial been held and recognised and treated as if it had been originally erected under the statutes or under express agreement, and then by implied contract the same obligations may attach to the heritors or to their successors in their several properties.”<sup>9</sup> It is not conclusive against this that the march fence is proved to have originally belonged to one estate, or to have been erected by one who

<sup>1</sup> *Earl of Airlie v. Farquharson*, 1887 (O.H.), 24 S.L.R. 761.

<sup>2</sup> *Pew v. Miller*, 1754, Mor. 10484.

<sup>3</sup> *Earl of Kintore v. Earl of Kintore's Trs.*, 1886, 13 R. 997, per L. J.-C. Moncreiff at p. 999.

<sup>4</sup> *Lumsden v. Gordon*, 1870, 42 Sc. Jur. 530; *Whitson v. Ramsay*, 1813, 5 Pat. 664.

<sup>5</sup> *Pew v. Miller*, *supra*; Rankine on Landownership.

<sup>6</sup> *Ramsay v. Primrose*, 1702, Mor. 10477; *Earl of Kintore v. Earl of Kintore's Trs.*, *supra*.

<sup>7</sup> *Lord Advocate v. Sinclair*, 1872, 11 M. 137.

<sup>8</sup> See *Earl of Kintore*, *supra*, per L. Rutherford Clark at p. 1000.

<sup>9</sup> *Strang v. Steuart*, 1864, 2 M. 1015, per L. Cowan at p. 1024.

was at the time proprietor of both the lands; nor that the fence is not strictly along the original boundary, but on one side of it.<sup>1</sup>

887. At the same time, it does not follow that whatever is *de facto* a division fence is therefore also a march fence.<sup>2</sup> Indeed, where, apart from any proceedings under the statute for the straightening of marches, a march fence is erected between lands, the titles of which contain a well-defined boundary line, the presumption seems to be that any deviation from the boundary line of the titles is made merely for convenience, and that rights of property, if not made matter of bargain, are reserved entire. This presumption may, however, be redargued.<sup>3</sup> And where two adjacent plots of ground were described in the titles by reference to a plan and to measurements qualified by the words "or thereby," neither the plan nor the measurements being strictly accurate, and where a mutual boundary was adjusted between the proprietors verbally, and a line of trees was planted at their mutual expense on this line and possession followed, the line so adjusted was held to be binding on a singular successor as the boundary, although he had not notice of the transaction.<sup>4</sup>

SUBSECTION (8).—*The Ownership and Upkeep of March Fences.*

888. However originating, once it is established that a fence is a march fence, it appears to be the common property of the coterminous landowners—differing, however, from other common property in that it is not liable to partition at the will of either of the owners—its nature being "to be and remain undivided."<sup>5</sup> Arising out of the common ownership or common interest, there rests upon the proprietors a common obligation to maintain the march fence when erected; and further, the Act of 1661 has been read as authorising not merely the original erecting and repair, but even the reconstruction of fences where necessary.<sup>6</sup> Neither party is, however, entitled to do the repairs at his own hand and then claim half the expense. He must, as in the case of construction, apply to the Judge Ordinary.<sup>7</sup>

889. A long-continued course of common contribution to the repair of a fence is in general the most satisfactory evidence of an implied contract making it mutual. It does not, however, *per se* establish a conclusive presumption for such mutuality.<sup>8</sup> On the other hand, although there are no Scottish cases directly in point, there seems no reason to doubt that in the case of a mutual fence the burden of repair may, by the means appropriate to a real burden, be thrown upon one party;

<sup>1</sup> *Lockhart v. Seivewright*, 1758, Mor. 10488; *Strang v. Stewart*, 1864, 2 M. 1015; 4 M. (H.L.) 5.

<sup>2</sup> *Strang v. Stewart*, *supra*, per L. J.-C. Inglis at p. 1030.

<sup>3</sup> *Readman v. Ferrier*, 1904, 12 S.L.T. 361.

<sup>4</sup> *Hetherington v. Galt*, 1905, 7 F. 706.

<sup>5</sup> Rankine on Landownership (4th ed.), pp. 610–638; *Lockhart v. Seivewright*, 1758, Mor. 10488.

<sup>6</sup> *Paterson v. MacDonald*, 1880, 7 R. 958.

<sup>7</sup> Rankine on Landownership (4th ed.), p. 621.

<sup>8</sup> *Strang v. Stewart*, *supra*.

and were this done, it would seem from various English cases that the proprietor liable to repair would, on failure to do so, be liable for injuries sustained by cattle lawfully on the adjacent lands, though not for those injured while trespassing.<sup>1</sup> In questions between landlord and tenant, the obligation to maintain a march fence devolves on the tenant whether the fence was in existence at the commencement of the tenancy or not, since the erection of a march fence, unlike other fences, is not purely voluntary on the part of the proprietor.<sup>2</sup> In certain cases a summary application will be entertained for the purpose of ascertaining as between landlord and tenant the condition of fences and the steps necessary for their repair.<sup>3</sup> In the last-cited case, it was held that such a proceeding was not appropriate where, *pendente processu*, the lease had been terminated by the landlord taking advantage of a conventional break.

**890.** Instead of the statutory or conventional obligation to bear equally the cost of erecting and maintaining a march fence, there seems no reason why the obligation of bearing the whole cost may not, by a competent mode, be laid on the proprietor of one of the adjoining estates, and transmit against singular successors. Though there is no reported case of this kind in Scotland, there have been many examples in England. The obligation will render the person bound to keep the fence repaired liable for the consequences of his failure to repair.<sup>4</sup>

#### SECTION 4.—FENCES IN SPECIAL LOCALITIES.

##### SUBSECTION (1).—*Railways.*

**891.** The obligation of railway companies in regard to fencing is regulated, so far as exceptional, by the Railway Clauses Consolidation (Scotland) Act, 1845.<sup>5</sup> By s. 16 it is made lawful for the company to construct, *inter alia*, fences. By the 60th section the company is bound to make and maintain certain "accommodation works," amongst which are posts, rails, hedges, ditches, mounds, or other fences for separating the lands taken from the adjoining lands.

##### SUBSECTION (2).—*Public Roads.*

**892.** The owners of land adjoining on roads are not under any obligation to erect fences, nor are the authorities, except at dangerous parts [Roads and Bridges (Scotland) Act, 1878,<sup>6</sup> incorporating s. 94 of Act of 1832]. It is a question to be considered in each case whether a

<sup>1</sup> Rankine on Landownership (4th ed.), p. 624.

<sup>2</sup> *Dudgeon v. Howden*, 23rd Nov. 1813, F.C.

<sup>3</sup> *Gordon's Trs. v. Melrose*, 1870, 8 M. 906; *Baird v. Mount*, 1874, 1 R. 1119, per L. Ardmillan at p. 1122; *Mags. of Kilmarnock v. Reid*, 1897, 24 R. 388; *Jenkins v. Gascoigne*, 1907 S.C. 1189.

<sup>4</sup> *Lawrence v. Jenkins*, 1873, L.R. 8 Q.B. 274.

<sup>5</sup> 8 & 9 Vict. c. 33.

<sup>6</sup> 41 & 42 Vict. c. 51.



road is or is not dangerous without fencing.<sup>1</sup> Owners of hedgerows are bound to keep them trimmed.<sup>2</sup> Where the boundary of an estate is a wall separating a road from an adjoining field, there is a presumption that the wall is the property of the heritor and not of the Road Trustees.<sup>3</sup> As regards the fencing of ponds, see the cases cited below.<sup>4</sup>

### SUBSECTION (3).—*Pits, Quarries, Shafts, etc.*

**893.** Where the ownership of the surface and the minerals has become separated, and the surface of the land is opened in connection with the mineral workings, in a question with the surface owners it lies upon the mineral owners, as the party giving rise to the changes, to take all reasonable precautions to avert risk.<sup>5</sup> The statutory duty of mine-owners in this respect is governed by the Metalliferous Mines Regulation Act, 1872,<sup>6</sup> and the Coal Mines Act, 1911.<sup>7</sup>

### SECTION 5.—SPECIAL KINDS OF FENCES, ETC.

**894.** There is generally little difficulty in tracing the history of ordinary paling and wire fences, so that their ownership can be easily ascertained.

By the Barbed Wire Act, 1893,<sup>8</sup> provision is made for the removal of barbed wire (*i.e.* any wire with spikes or jagged projections) from fences on lands adjoining any highway, where such wire may probably injure persons or animals lawfully using the highway.

**895.** Being useful only to the lower proprietor, a sunk fence would probably not be a march fence in the sense of the ancient statute before referred to, and so no contribution would be exigible for its repair from the upper proprietor, who would not benefit by it.

**896.** Trees in the actual line of the march follow the fence as regards ownership.<sup>9</sup> Trees, however, growing to the side of the boundary belong to him in whose land they grow, even if the roots extend into the adjoining land;<sup>10</sup> but the neighbour is entitled to require them to be so pruned that the branches shall not extend across the march.<sup>11</sup>

<sup>1</sup> *Fraser v. Mags. of Rothesay*, 1892, 19 R. 817. Cf. *Harris v. Mags. of Leith*, 1881, 8 R. 613; *Greer v. Stirlingshire Road Trs.*, 1882, 9 R. 1069; *Barrie v. Police Commissioners of Kilsyth*, 1898, 1 F. 194; *Horsburgh v. Sheach*, 1900, 3 F. 268; *M'Intyre v. Lochaber District Committee*, 1901, 4 F. 188; *Taylor v. Mags. of Saltcoats*, 1912 S.C. 880.

<sup>2</sup> Roads and Bridges (Scotland) Act, 1878 (41 & 42 Vict. c. 51), Sch. C, incorporating ss. 88 and 89 of 1 & 2 Will. IV. c. 43.

<sup>3</sup> *Johnstone v. Meikle & Murray*, 1901 (O.H.), 9 S.L.T. 74.

<sup>4</sup> *Ross v. Keith*, 1888, 16 R. 86; *Allan v. Dunfermline District Council*, 1908, 46 S.L.R. 25; 16 S.L.T. 410; *Hastie v. Mags. of Edinburgh*, 1907 S.C. 1102; *Stevenson v. Glasgow Corporation*, 1908 S.C. 1034.

<sup>5</sup> *Williams v. Groucott*, 1863, 4 B. & S. 149; *Hawken v. Shearer*, 1887, 56 L.J.Q.B. 284; *Holland v. Lanarkshire Middle Ward District Committee*, 1909 S.C. 1142.

<sup>6</sup> 35 & 36 Vict. c. 77, ss. 13 and 23 (6).

<sup>7</sup> 1 & 2 Geo. V. c. 50, ss. 26, 37, 55.

<sup>8</sup> 56 & 57 Vict. c. 32.

<sup>9</sup> *Wilson v. Laing*, 1844, 7 D. 113, per L. Mackenzie at p. 115.

<sup>10</sup> *Hetherington v. Galt*, 1905, 7 F. 706.

<sup>11</sup> *Halkerston v. Wedderburn*, 1781, Mor. 10495.



897. A ditch may be either a single ditch with a bank or a double ditch with a bank between. Where the boundary appears from the titles, it is decisive. If the titles are silent, the presumption, in the absence of contrary evidence, is that both ditch and bank belong to the party on whose land the bank is.<sup>1</sup>

For questions as to fences between landlord and tenant, see LEASE. As to common gables, see COMMON GABLE.

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<sup>1</sup> *Thomson v. Purves*, 1829, 7 S. 730; *Girvan v. Smith*, 1829, 8 S. 173.

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## BOWING OF COWS.

*See* LEASE.

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## BOX-DAYS.

## BOXING.

*See* COURT OF SESSION.

## BREACH OF ARRESTMENT.

*See* ARRESTMENT.

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## BREACH OF CONTRACT.

*See* CONTRACT; DAMAGES.

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## BREACH OF INTERDICT.

*See* CONTEMPT OF COURT; INTERDICT.

# BREACH OF PROMISE OF MARRIAGE.

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## SECTION 1.—NATURE OF REMEDY.

**898.** A promise to marry will not be specifically enforced by the Court, but an action of damages lies against the party who wrongfully refuses to implement the contract.<sup>1</sup> Attempts have been made to abolish this right of action, except as limited to the recovery of pecuniary loss, and a resolution to that effect was carried in the House of Commons on 6th May 1879.<sup>2</sup> The action is competent at the instance of the man.<sup>3</sup> But he will rarely get more than nominal damages.<sup>4</sup> The essential facts to be averred and proved are (a) the promise and acceptance, and (b) the failure to implement it. (For the law as to the constitution of marriage by promise *cum copula subsequente*, see MARRIAGE.)

## SECTION 2.—PROOF OF PROMISE.

**899.** The promise may be proved by parole, and the parties are competent witnesses.<sup>5</sup> The promises must be reciprocal. But express words of promise need not be proved. The promise and acceptance may be inferred from the conduct of the parties, from a course of correspondence, or from statements made to third parties; and where the man's offer or promise is proved, the woman's acceptance will be readily

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GENERAL AUTHORITIES.—Ersk. i. 6, 3; Bell, Prin., 1508, 2033; Fraser, H. & W. i. 484; Voet, 23, 1, 13; Pothier, *Traité du Contrat de Mariage*, Part II. Ch. i. Art. 7; Bishop, *Marriage & Divorce*, s. 182; Walton, H. & W., 2nd ed., 242.

<sup>1</sup> Ersk. i. 6, 3.

<sup>2</sup> Hansard, vol. ccxlv. pp. 1867–89.

<sup>3</sup> *Thomson v. Wright*, 1767, Mor. 13915; *Macgillivray v. Mackintosh*, 1891. 28 S.L.R. 488.

<sup>4</sup> See *Longmore v. Massie*, 1883, Guthrie's Select Cases, ii. 450.

<sup>5</sup> See 37 & 38 Vict. c. 64, s. 1, which repeals s. 4 of 16 & 17 Vict. c. 20.

presumed from her conduct.<sup>1</sup> But the correspondence or other evidence may lead to the inference that the woman never consented, in which case the man could not be guilty of breach.<sup>2</sup> A mere expression to third parties of a desire or intention to marry a woman, not made in her presence or authorised to be communicated to her, is not a promise.<sup>3</sup>

**900.** The promise may be qualified by any reasonable condition, *e.g.* that the marriage is not to take place till the death of the man's father, in which case there will be no breach till the condition has been fulfilled, unless before then the man has declared his intention not to marry the woman, or has married another woman. If the promisor has so repudiated the contract, or put it out of his power to fulfil it, the right of action at once arises to the other party.<sup>4</sup>

**901.** An unconditional promise to marry is an obligation to marry within a reasonable time, looking to the circumstances of each party.<sup>5</sup>

### SECTION 3.—BREACH.

**902.** It is a breach if the defender expressly repudiates the contract, or puts himself in such a position that he cannot fulfil it, *e.g.* by marrying another.<sup>6</sup> And breach may be inferred from the cessation of communications between the parties, or from other conduct evincing a determination not to fulfil the contract.<sup>7</sup> Where the man wrote to the woman that he had ceased to love her, but would marry her if she liked, an issue was allowed.<sup>8</sup> But mere rudeness by the defender is not breach, unless the jury think it was intended to make the pursuer give up the contract.<sup>9</sup> Where the circumstances indicate that there has been a breach, an offer in the defences to marry the pursuer may be regarded as coming too late.<sup>10</sup>

### SECTION 4.—DEFENCES.

#### SUBSECTION (1).—*Release.*

**903.** It is of course a good defence that the pursuer has released the defender from the engagement. Release need not be express, but

<sup>1</sup> *Hogg v. Gow*, 27th May 1812, F.C.; *Murray v. Napier*, 1861, 23 D. 1243; *Honyman v. Campbell*, 1831, 5 W. & S. 145; *Tucker v. Aitchison*, 1846, 9 D. 21; *Hutton v. Mansall*, 1704, 3 Salk. 16, 64; *Fraser, H. & W. i.* 496.

<sup>2</sup> See *Morrison v. Dobson*, 1869, 8 M. 347; *Vineall v. Veness*, 1865, 4 F. & F. 344.

<sup>3</sup> *Cole v. Cottingham*, 1837, 8 C. & P. 75.

<sup>4</sup> *Cole, ut supra*; *Frost v. Knight*, 1872, L.R. 7 Ex. 111. See *Caines v. Smith*, 1846, 15 M. & W. 189.

<sup>5</sup> *Fraser, H. & W. i.* 489; *Bishop, Marriage & Divorce*, s. i. 188; see *Potter v. Deboos*, 1815, 1 Stark, 82; *Hall v. Wright*, 1858, E.B. & E. 746, esp. per Erle J. at p. 754; *Short v. Stone*, 1846, 8 Ad. & Ell. 358.

<sup>6</sup> *Caines, ut supra*.

<sup>7</sup> *Cattanach v. Robertson*, 1864, 2 M. 839; *Currie v. Guthrie*, 1874, 12 S.L.R. 75.

<sup>8</sup> *Cattanach, ut supra*.

<sup>9</sup> *Stoole v. M'Leish*, 1870, 8 M. 613.

<sup>10</sup> *Cattanach, ut supra*; see *Dennis v. M'Kenzie*, 1871, 24 L.T. 363.



may be inferred from the conduct of the parties, which may be such as to shew that the contract has been terminated by mutual consent. Where communications between the parties have ceased, delay in raising the action will create a presumption of acquiescence in the termination of the contract.<sup>1</sup>

#### SUBSECTION (2).—*Legal Impediment.*

**904.** It is a good defence that there is a legal impediment to the marriage, if both parties knew of it at the date of the promise.<sup>2</sup> A promise made by a man who, to the knowledge of the woman, is already married is void as contrary to public policy. Thus a promise given to a woman by a married man to marry her on the death of his wife will not found an action for damages for breach of promise.<sup>3</sup> But the fact that the man was married when he made the promise is no defence, but rather an aggravation, if that fact was unknown to the woman.<sup>4</sup>

#### SUBSECTION (3).—*Unchastity.*

**905.** If the woman has had sexual intercourse with another man since the promise, or before it, if unknown to the defender when he promised, he is entitled to resile.<sup>5</sup> The view has been expressed that this condition would apply to the case of a widow who concealed her former marriage.<sup>6</sup> In either case the defence will fail if he forgave her and did not break off the relation.<sup>7</sup> Pothier is of opinion that the man would not be held to his contract if the woman were ravished after the promise.<sup>8</sup> J. Voet expresses a contrary opinion, on the ground that this is to punish the innocent for the fault of the guilty. But the woman cannot found on her own unchastity as an excuse for her failure to implement the contract.<sup>9</sup>

#### SUBSECTION (4).—*Incapacity.*

**906.** The discovery, after the promise, that one party is incapable of sexual connection, would entitle the other party to resile. For it would be absurd to treat as a breach of refusal to marry on a ground on which the defender could have the marriage declared null. So in an American case it was held a valid defence that the woman was unable to

<sup>1</sup> *Colvin v. Johnstone*, 1890, 18 R. 115; *Davis v. Bomford*, 1860, 6 H. & N. 245; *Macgillivray v. Mackintosh*, 1891, 28 S.L.R. 488.

<sup>2</sup> *Harrison v. Cage*, 16991, Ld. Raym. 386; *Fraser, H. & W. i. 492.*

<sup>3</sup> *Spiers v. Hunt*, [1908] 1 K.B. 720; *Wilson v. Carnley*, [1908] 1 K.B. 729.

<sup>4</sup> *Millward v. Littlewood*, 1850, 5 Ex. 775.

<sup>5</sup> *Fletcher v. Grant*, 1878, 6 R. 59; *Irving v. Greenwood*, 1824, 1 C. & P. 350; *Bench v. Merrick*, 1844, 1 C. & K. 463; see *Hall v. Wright*, 1858, E.B. & E. 746; *Voet*, 23, 1, 13; *Fraser, H. & W. i. 493.*

<sup>6</sup> See *Beachey v. Brown*, 1860, E.B. & E. 796, at 799. But see *J. Voet*, 23, 1, 14.

<sup>7</sup> *Irving, Bench, Hall, ut supra.*

<sup>8</sup> *Traité du Contrat de Mariage*, Part II. Ch. i. Art. 7.

<sup>9</sup> *Voet, Pothier, Fraser, l.c., and cases cited.*

have sexual intercourse, and refused to submit to a surgical operation, although she had promised to do so.<sup>1</sup>

#### SUBSECTION (5).—*Fraud.*

**907.** No action will lie if the promise was induced by fraudulent misrepresentation or concealment of material facts as to the character, position, or previous history of the pursuer.<sup>2</sup> But one who promises marriage is bound to satisfy himself as to the character and suitability of the other party; and a woman to whom an offer is made is not, in general, bound to disclose circumstances which might induce the man to retract it. Even where a woman accepted an offer and concealed the fact that she was engaged to another man, it was held, in England, that she was not barred from insisting in a claim of damages.<sup>3</sup> And in another English case a man was held guilty of breach though his reason was that the woman had been of unsound mind and confined in a lunatic asylum, a fact of which he was ignorant at the time of the promise.<sup>4</sup> The soundness of both these decisions, especially of the latter, may well be doubted.<sup>5</sup>

#### SUBSECTION (6).—*Change of Circumstances.*

**908.** The pursuer's character may be proved to have become so bad that the defender will be excused for breaking off the contract.<sup>6</sup> In *Thomson's* case, the woman had an *embarras de richesses* of such defences. And so where the man had conducted himself in a violent and brutal manner, and threatened to use the woman ill, it was said by L. Ellenborough that she had a right to say she would not commit her happiness to such keeping.<sup>7</sup> But mere rudeness is not sufficient justification.<sup>8</sup> It is possible there may be other changes of circumstances, such as the pursuer having become paralytic or a leper, which would be a legal answer to the action.<sup>9</sup> Pothier's statement is that the one party is always freed from the engagement when anything has happened to the other party, which, if the former had foreseen it, would certainly have prevented his making the promise. This is undoubtedly too wide. It is no defence that the defender honestly and on reasonable grounds believed the pursuer to be unfit to marry if she was not so in fact.<sup>10</sup>

<sup>1</sup> *Gring v. Lerch*, 1886, 56 Amer. Rep. 314.

<sup>2</sup> *Wharton v. Lewis*, 1824, 1 C. & P. 529; *Footte v. Hayne*, 1824, 1 C. & P. 545; Fraser, H. & W. i. 491.

<sup>3</sup> *Beachey v. Brown*, 1860, E.B. & E. 796.

<sup>4</sup> *Baker v. Cartwright*, 1861, 10 C.B. (N.S.) 124.

<sup>5</sup> See Fraser, H. & W. i. 481; Bishop, Marriage & Divorce, i. s. 221.

<sup>6</sup> *Thomson v. Wright*, 1767, Mor. 13915; *Baddeley v. Mortlock*, 1816, Holt N.P.C. 151.

<sup>7</sup> *Leeds v. Cook*, 1803, 4 Esp. 255.

<sup>8</sup> *Stoole v. M'Leish*, 1870, 8 M. 613.

<sup>9</sup> See Pothier, Traité du Contrat de Mariage, Part II. Ch. i. Art. 7, 60; *Atchinson v. Baker*, 1797, Peak. Add. Ca. 103, per L. Kenyon.

<sup>10</sup> *Jefferson v. Paskell*, [1916] 1 K.B. 57 (C.A.); see *Baddeley v. Mortlock*, *ut supra*,

909. Can the defender found on his own supervening inability to fulfil the contract? Suppose that his own health has become such as to render him unfit to marry. In *Hall v. Wright*<sup>1</sup> the man's defence was that he was in an advanced stage of consumption and could not marry without danger to life. In the Queen's Bench the Court was equally divided, and in the Exchequer Chamber, by a majority of one, the defence was held insufficient. But to some extent the fact was founded on that the defendant had allowed the plaintiff to go on with her action, without giving her notice of the nature of his defence. The Scottish Courts have declined to follow this decision. Where a man on the brink of insanity postponed his marriage and was shortly afterwards certified and died insane, the Court in an action against his testamentary trustee held that there was no breach.<sup>2</sup> They approved the following statement of the law in an American case: "If either party should, after the promise, become by the act of God, and without fault on his own part, unfit for the relation of marriage, and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise—the main part of the contract having become impossible of performance, the whole will be considered to be so."<sup>3</sup>

#### SECTION 5.—DOES THE RIGHT OF ACTION TRANSMIT TO OR AGAINST EXECUTORS?

910. There is no authority in the law of Scotland on the question, whether an action of damages for breach of promise can competently be raised by executors. In England it is settled that this form of claim is excluded by the rule *actio personalis moritur cum persona*, except to the extent to which the deceased suffered special damage, *i.e.* temporal loss flowing directly from the breach.<sup>4</sup> But this maxim is a doctrine of English law which has never been adopted in the law of Scotland *eo nomine*.<sup>5</sup> In Scotland it is settled that an action of damages for personal injury may be insisted in by the executor of the pursuer,<sup>6</sup> and may be raised by the executor if, but only if, the deceased has shewn by his actings that he has elected to make a claim.<sup>7</sup> If the deceased has taken no steps to shew his intention to raise an action, his executor will not be permitted to make a claim which the deceased has abstained from making.<sup>8</sup> Even if patrimonial loss is averred, it is doubtful

<sup>1</sup> 1859, E.B. & E. 746.

<sup>2</sup> *Liddell v. Easton's Trs.*, 1907 S.C. 154.

<sup>3</sup> *Allen v. Baker*, 1882, 41 Amer. Rep. 444; followed in *Shackleford v. Hamilton*, 1892, 40 Am. State Rep. 166.

<sup>4</sup> *Chamberlain v. Williamson*, 1814, 2 M. & S. 408.

<sup>5</sup> *Riley v. Ellis*, 1910 S.C. 934, per L.P. Dunedin at p. 943.

<sup>6</sup> *Neilson v. Rodger*, 1853, 16 D. 325, per L. Wood; *Darling v. Gray & Sons*, 1892, 19 R. (H.L.) 31; *Borthwick v. Borthwick*, 1896, 24 R. 211.

<sup>7</sup> *M'Enaney v. The Caledonian Rly. Co.*, 1913, 1 S.L.T. 373.

<sup>8</sup> *Boyce's Exr. v. M'Dougall*, 1903, 5 F. 452; *Traill v. Actieselskab Dalbeattie*, 1904, 6 F. 798, per L. Kinnear at p. 806; *Bern's Exr. v. Montrose Asylum*, 1893, 20 R. 859.

whether the executor has a title to sue, unless the deceased had elected to make a claim.<sup>1</sup> On the other hand, there appears to be no authority in Scotland against the view that a claim of damages for breach of contract will transmit to executors.<sup>2</sup> An action of damages for breach of promise is based upon breach of contract, although it is peculiar in this respect, that the conduct of the defender may be taken into account and accordingly damages are assessed upon principles more analogous to those ruling in actions on delict than on contract. It is therefore doubtful whether such a claim ought properly to be regarded as in the same category as a claim of damages for slander or seduction, which is not competent to an executor where the injured person has not elected to make a claim in his lifetime.<sup>3</sup> There appears to be no reason why such a claim should not competently be insisted in by executors if the deceased had raised an action, or had otherwise shewn an intention to prosecute the claim.

**911.** The action is competent against the executors of the defender.<sup>4</sup> Actions founded upon delict so transmit,<sup>5</sup> both as regards patrimonial loss and *solatium*,<sup>6</sup> and so do actions founded upon breach of contract.<sup>7</sup>

#### SECTION 6.—MEASURE OF DAMAGES.

**912.** The amount of damages in actions of this kind is eminently a question for the jury, and the Court will be very slow to interfere with their award.<sup>8</sup> Compensation is due not only for out-of-pocket expenses and for loss of market—that is, for loss of the particular marriage and diminished prospects of marriage generally<sup>9</sup>—but also *in solatium* for wounded feelings.<sup>10</sup> Evidence as to the defender's means is admissible and usual.<sup>11</sup> In one case opposite views were expressed, by Lord Young and Lord Trayner, as to whether the pursuer was entitled to a diligence to recover the defender's books in order to ascertain his financial position, and the diligence was refused,<sup>12</sup> but diligence has been granted in subsequent cases.<sup>13</sup>

<sup>1</sup> See *Auld v. Shairp*, 1874, 2 R. 191 and 940; *Bern's Exr.*, *supra*, and the comments upon *Auld's* case in *Riley v. Ellis*, 1910 S.C. 934.

<sup>2</sup> *Riley*, *supra*, per L. Johnston at p. 938.

<sup>3</sup> See *Bern's Exr.*, *supra*, per L. McLaren.

<sup>4</sup> *Liddell v. Easton's Trs.*, 1907 S.C. 154.

<sup>5</sup> Ersk. iii, 1, 15.

<sup>6</sup> *Macnaughton v. Robertson*, 17th Feb. 1809, F.C.; *Morrison v. Cameron*, 25th May 1809, F.C.

<sup>7</sup> *Evans v. Stool*, 1885, 12 R. 1295.

<sup>8</sup> Sedgwick on Damages, 7th ed., ii. 449; *Smith v. Woodfull*, 1857, 1 C.B. (N.S.) 660; *Berry v. Da Costa*, 1866, L.R. 1 C.P. 331; *Bishop, Marriage & Divorce*, i. s. 226; but see *Fraser, H. & W.* i. 496.

<sup>9</sup> *Grahame v. Burn*, 1685, Mor. 8472.

<sup>10</sup> *Hogg v. Gow*, 27th May 1812, F.C.

<sup>11</sup> *Smith, Berry*, *ut supra*.

<sup>12</sup> *Somerville v. Thomson*, 1896, 23 R. 576.

<sup>13</sup> *Brodie v. M'Gregor*, 1900 (O.H.), 8 S.L.T. 200; *Stroyan v. M'Whirter*, 1901 (O.H.), 9 S.L.T. 242.



## SECTION 7.—PROCEDURE.

**913.** An action for breach of promise will be sent to a jury, unless special cause is shewn why this should not be done.<sup>1</sup> The usual form of issue is: “Whether in or about the month of \_\_\_\_\_, 19\_\_\_\_, the defender promised and engaged to marry the pursuer, and whether the defender wrongfully failed to implement the said promise and engagement, to the loss, injury, and damage of the pursuer.”<sup>2</sup>

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<sup>1</sup> Evidence Act, 1866 (29 & 30 Vict. c. 112), s. 2; see *Trotter v. Happer*, 1888, 16 R. 141.

<sup>2</sup> *Colvin v. Johnstone*, 1890, 18 R. 115.

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## BREACH OF THE PEACE.

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## BREACH OF TRUST AND EMBEZZLEMENT.

*See* CRIME.

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## BREACH OF WARRANTY.

*See* SALE.

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## BREAD.

*See* FOOD AND DRUGS.

## BREAKING BULK.

*See* SALE.

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## BREAKING ENCLOSURES. BREAKING OF PRISON.

*See* CRIME.

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## BREWING.

*See* CUSTOMS AND EXCISE; LICENSING LAWS.

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## BRIBERY.

*See* CRIME.

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## BRIDGES.

*See* ROADS AND BRIDGES.

## BRIEVE.

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## SECTION 1.—DEFINITION AND HISTORY.

**914.** A brieve is a writ which is, as the name implies, short and compendious in its terms. It is issued from Chancery in name of the Sovereign, and is addressed to an inferior judge, directing him to make trial by a jury of the questions stated in the brieve.

**915.** Procedure by brieve was introduced into Scotland by James I. upon the model of the system in vogue in England, with which he had become acquainted during his captivity in that country. Until the institution of the Court of Session by James V. in 1532 briefes were the foundation of almost all civil actions in Scotland. The chief classes of briefes were the *breve de recto*, whereby the right of property, and the *breve de nova dissasina*, whereby the right of possession, were determined. Upon the institution of the Court of Session, briefes went to a large extent out of use, being superseded by summonses “in the styles accustomed by the Writers to the Signet, and, sustained by the Lords, directed to Sheriffs in that part, having a blank for inserting the name of any person the pursuer pleased, who thereby was substituted in place of the Sheriff.”<sup>1</sup> The briefes which remained in use after the general adoption of procedure by summons were those of (1) mort ancestry or service; (2) tutorship; (3) idiorty and furiosity; (4) terce; (5) division (6) lining; and (7) perambulation. Of these the first three were retourable, *i.e.* required an answer to be returned to Chancery for the purpose of being registered there with a view to an extract being given out; the others did not require to be retoured. Procedure by brieve has now fallen for the most part into desuetude, but it is still occasionally resorted to.<sup>2</sup>

## SECTION 2.—BRIEVE OF SERVICE.

**916.** Though all briefes were executed by the intervention of an inquest or jury, the special name of “brieve of inquest” was always

<sup>1</sup> Stair, iv. 3, 4.

<sup>2</sup> See Skene, *De verborum Significatione*, p. 22; Stair, iv. 3, 4 *et seq.*; Ersk. iv. 1, 3; Bankt. ii. 5, 54; Kames, Stat. Law Abridgment, *h.t.*; Mackay, Prac. i. 267.

used to denote the procedure for the service of heirs. The brieve was directed to any Judge Ordinary, if the application was for general service, or to the Sheriff of the county within which the lands lay, if the application was for special service. The subjects of inquest were the claimant's propinquity to the deceased, and, in the case of special service, various particulars regarding the tenure of the lands. Formerly the inquest had to be summoned fifteen days before the service, but afterwards they could be summoned on the shortest warning, and it was not uncommon for persons, if present in the Court House, to be summoned to act on the inquest, provided no disqualification was stated against them. The inquest consisted latterly of fifteen persons, but in earlier times this number varied ; though it was always an odd number so as to ensure a verdict. The jury served the heir, and the judge returned the service to Chancery, an extract from which was the evidence of the heir's right. If propinquity was not established under one brieve, others could be purchased.<sup>1</sup> Procedure by brieve of service ceased at the passing of the Service of Heirs Act, 1847,<sup>2</sup> and has been superseded by petition in manner now prescribed by the Titles to Land Consolidation (Scotland) Act, 1868.<sup>3</sup> See CHANCERY.

### SECTION 3.—BRIEVE OF TUTORY.

**917.** This is a rare but still competent form of process. Failing testamentary tutors, the nearest agnate may apply to be appointed to the office of tutor at law. A brieve is issued, addressed to any judge having jurisdiction, requiring him to call a jury to ascertain (1) who is the nearest male agnate of the age of twenty-five entitled to succeed to the pupil ; (2) whether he is attentive to his own affairs ; (3) whether he can give security ; and (4) who is the nearest cognate of the ward, for the person of the pupil is entrusted to the latter, the nearest agnate having control only of the estate. In practice, the jury makes inquiry only into the first head of the inquest, the agnate's fitness for the office being presumed until the contrary is proved, his sufficiency being matter for the clerk, and the last head being left to the decision, in case of dispute, of the ordinary Courts of law. The brieve is executed on a fifteen days' *inducie* at the market cross of the head burgh of the judge's territory, and after the inquest is made, and the verdict is retoured to Chancery, a letter of tutory is expedite under the quarter seal, and issued to the tutor upon his finding caution and taking the oath *de fidei*.<sup>4</sup> This procedure is now almost entirely superseded by that of appointing a factor *loco tutoris* under the Pupils' Protection Act, 1849.<sup>5</sup> See TUTOR (*Tutor-Dative*).

<sup>1</sup> *Officers of State v. Alexander*, 1866, 4 M. 741. L. P. Inglis at p. 745.

<sup>2</sup> 10 & 11 Vict. c. 47.

<sup>3</sup> 31 & 32 Vict. c. 101, s. 27 *et seq.* ; Ersk. Inst. iii, 8, 59.

<sup>4</sup> Stair, iv. 3, 6 ; Ersk. i. 7, 6.

<sup>5</sup> 12 & 13 Vict. c. 51 ; Juridical Styles, vol. iii. 612 and 665 *et seq.*



## SECTION 4.—BRIEVES OF IDIOTRY AND FURIOSITY—BRIEVE OF COGNITION.

SUBSECTION (1).—*Former Procedure.*

918. Prior to the Court of Session Act, 1868,<sup>1</sup> the fact of insanity might be established by brieve from Chancery in the old form directed to the Judge Ordinary of the territory within which the person said to be fatuous or furious resided. He required to be made a party to the brieve, having a good interest to oppose it, if of sound mind, and his person had to be exhibited at the inquest, so that the jury might have an opportunity of forming an opinion as to his state of mind by conversation with him. If that was omitted, the verdict was reducible.<sup>2</sup> It was the duty of the jury to determine (1) whether the insanity existed, and if so, from what time, for by 1475, c. 66, no alienation made by an insane person after the commencement of his disorder was valid; and (2) who was the nearest male agnate of the age of twenty-five. The curatory of furious persons belonged originally to the Crown, as the King alone had the power of coercing by chains and fetters.<sup>3</sup> This was, however, abolished by 1585, c. 18, which gave the office to the next agnate, as in the case of persons merely fatuous. The nearest cognate was entitled to the custody of the person as in the case of pupils.

919. Brieves of idiocy and furiosity were similar in their terms, except that in the former the inquest was *Si sit incompus mentis, fatuus et naturaliter idiota*; and in the latter, *Si sit incompus mentis, prodigus et furiosus*, viz. *quod neque tempus neque modum impensarum habet sed bona et possessiones dilacerandas et dissipandas profundit*. Where there was any doubt whether the condition alleged was idiocy or furiosity, brieves of both kinds might be taken out, and only that which was established by the inquest was retoured to Chancery.<sup>4</sup> Where an insane person was cognosced, and the nearest male agnate declined to serve, the Court of Session, as coming in place of the Court of Exchequer, might appoint a tutor dative.<sup>5</sup> Such appointments were very rare, the practice being to apply for a *curator bonis* if the next agnate declined office.<sup>6</sup>

SUBSECTION (2).—*Present Procedure.*

920. The procedure in the cognition of insane persons is now regulated by the Court of Session Act, 1868,<sup>7</sup> and formerly by Act of Sederunt, 3rd December 1868, and now by Codified Act of Sederunt.<sup>8</sup> The Statute provides: <sup>9</sup> "It shall no longer be competent to direct a brieve for the cognition of a person alleged to be *incompus mentis prodigus et furiosus*, or of a person alleged to be *incompus mentis fatuus et naturaliter idiota*, to the Judge Ordinary; and the brieves of furiosity and idiocy

<sup>1</sup> 31 & 32 Vict. c. 100.

<sup>3</sup> Craig, ii. 20, 9.

<sup>5</sup> 19 & 20 Vict. c. 56, s. 19.

<sup>7</sup> 31 & 32 Vict. c. 100.

<sup>2</sup> *Dewar v. Dewar*, 25th Feb. 1809, F.C.

<sup>4</sup> *Stark v. Stark*, 1746, Mor. 6291.

<sup>6</sup> *Bryce v. Grahame*, 1828, 6 S. 425, 3 W. & S. 323.

<sup>8</sup> C.A.S., D, vi.

<sup>9</sup> Sec. 101.

hitherto in use are hereby abolished ; and in lieu thereof, it is enacted that a brieve from Chancery, written in the English language, shall be directed to the Lord President of the Court of Session, directing him to inquire whether the person sought to be cognosced is insane, who is his nearest agnate, and whether such agnate is of lawful age ; and such person shall be deemed insane if he be furious or fatuous, or labouring under such unsoundness of mind as to render him incapable of managing his affairs ; and such brieves shall be served upon the persons sought to be cognosced on *induciæ* of fourteen days ; and the brieve shall be tried before the said Lord President and a special jury, or before any other judge of the Court of Session to whom the said Lord President may remit the same, and a special jury ; and the trial shall be conducted in the same manner as jury trials in civil causes in Scotland are conducted, with all the like remedies as to motions for new trials and bills of exceptions, which are competent with reference to such jury trials ; and the Court shall have power to award expenses against either party ; but they shall not award expenses against the party prosecuting the brieve, unless they are of opinion that the same was prosecuted without reasonable or probable cause ; and the verdict and service of the jury shall be retoured to Chancery, and shall, unless set aside on any ground, have the like force and effect, and be followed by the like procedure, as a retour of the verdict and service of the jury before the Judge Ordinary according to the present law and practice.”

921. The Codified Act of Sederunt provides that when a brieve from Chancery, under the provisions of the Act, is presented to the Lord President, he is to issue a precept to messengers-at-arms, commanding them to summon the person sought to be cognosced to appear at a time and place to be specified, being not less than fourteen days from the date of service, to hear and see the matter of the brieve duly cognosced and determined. The person presenting the brieve must also, within the fourteen days, give public notice of the brieve and precept, once in the *Edinburgh Gazette*, and by advertisement twice at least in a newspaper published within the county—or if there be none such, in the county next adjoining—to that in which the person sought to be cognosced resides. No further or other service or publication of the brieve is necessary, either at the market cross of the head burgh of the county within which the person sought to be cognosced resides, or otherwise.<sup>1</sup>

922. At the time and place specified in the precept, the Lord President, after hearing parties, appoints the person claiming the office of curator to lodge his claim to the office within a certain specified time, and the person sought to be cognosced, or those acting on his behalf, to answer the claim within a specified time thereafter, the claim and answers being prepared in the form of a condescendence and answers, and stating all facts necessary to be disclosed in order to prevent surprise. The Lord

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<sup>1</sup> D, vi. 1.

President then, if no valid objection is stated to the briefe or to the regularity of the procedure, fixes the time and place for the trial of the briefe, and gives such directions as may be necessary to secure the presence of the person sought to be cognosced before the jury.<sup>1</sup> The principal clerk of session in the First Division is clerk in the proceedings and trial with power to the Lord President to appoint a substitute.<sup>2</sup> The order of the Lord President fixing the time and place of trial, or a certified copy, is sufficient warrant to the Sheriff of the county of Edinburgh, or to the Sheriff of the county within which the trial is appointed to take place, to summon a special jury in common form. The reducing of the jury to twenty, and the calling and balloting of the special jury at the trial, are conducted according to the ordinary rules in the trial of civil causes in the Court of Session. The number of jurors empanelled to try the briefe is twelve, and they return their verdict either unanimously or by such majority, and under such conditions, as are provided in the case of verdicts returned by juries in the trial of civil causes in the Court of Session.<sup>3</sup> The trial may be postponed,<sup>4</sup> on cause shewn, on such conditions regarding expenses as may seem just.

923. Under the Act of Sederunt of 3rd December 1868, when the jury returned their verdict, affirming the whole heads of the briefe, it was noted generally "Cognosce"; but when the jury did not affirm the whole heads of the briefe, the verdict was noted generally "Not cognosce," unless there were any special finding regarding the person claiming in the character of nearest agnate (in which case the clerk made such note as the presiding judge might direct), and the jury were then discharged. Under the Codified Act of Sederunt,<sup>5</sup> when the jury return their verdict, the clerk is directed to receive it in common form, engross it in the interlocutor sheet, read it over to the jury, and subscribe it in the presence of the jury, who are thereafter dismissed. It is the duty of the clerk thereafter to make out and subscribe a formal writing, embodying the verdict, and answering the several heads of the briefe, and also setting forth whether the claim (if any) of the party suing the briefe is sustained or dismissed; which writing is either retoured to Chancery or entered in the Minute Book according as the verdict is for or against cognition.<sup>6</sup>

In other respects the trial is conducted in manner similar to that followed in civil jury trials in the Court of Session, provision being made for bills of exception or motions for a new trial,<sup>7</sup> and as regards expenses.<sup>8</sup>

924. Any near relation may purchase the briefe, but the jury should find who is the nearest agnate. The latter may come forward after the briefe has been retoured to Chancery and claim the office, but if he does not, the Court may appoint a tutor dative, or a petition may be presented for appointment of a *curator bonis*.<sup>9</sup> When the Court is satisfied, by the production of medical certificates, that insanity exists, and that steps

<sup>1</sup> D. vi. 2.

<sup>2</sup> D. vi. 3.

<sup>3</sup> D. vi. 4.

<sup>4</sup> D. vi. 5.

<sup>5</sup> D. vi. 6.

<sup>6</sup> D. vi. 8.

<sup>7</sup> D. vi. 7.

<sup>8</sup> D. vi. 9.

<sup>9</sup> *Larkin v. M'Grady*, 1874, 2 R. 170.



ought to be taken for the protection of the estate, it may appoint a *curator bonis* without waiting for the verdict of an inquest under a brief of cognition, even although that may be demanded by the alleged lunatic.<sup>1</sup> See TUTORs AND CURATORS.<sup>2</sup>

#### SECTION 5.—BRIEF OF TERCE.

925. Prior to the Conveyancing (Scotland) Act, 1924,<sup>3</sup> under this process the widow of a man who died infert in heritage could have established judicially her right to a liferent of one-third thereof. The brief was directed to the Sheriff of the county within which the lands lay or to the Sheriff of Edinburgh, if they were in more than one shire. Service, or an equivalent, was probably necessary in order that the right might vest,<sup>4</sup> but after the widow had served she acquired a *pro indiviso* right with the heir to the possession of one-third of the property or to one-third of the rents. It was the duty of the inquest to inquire whether the claimant was the lawful wife of the deceased, but they were bound to conclude this in her favour, for the purposes of the inquest, if she was holden and reputed as his lawful wife during his lifetime.<sup>5</sup> They also inquired whether the husband died vest as of fee in the lands, and this was proved by production of his infertments. The jury then served and cognosed the widow to a just and reasonable terce of the lands, which she might crave to be "kenned," i.e. divided from the two-thirds belonging to the heir, or she might content herself with a third of the rents until a division was made (see TERCE). Procedure by brief was very rarely resorted to, but it was adopted in the case of *Craik, supra*. The rights of the heir and widow were usually settled extra-judicially, either amicably or by arbitration, and declarator was also competent. Actions of serving to terce and kenning to terce were abolished by the Conveyancing Scotland Act, 1924,<sup>6</sup> which, subject to the provisions therein contained, substituted therefor an action of declarator, decree in which confers upon the widow the same rights and remedies for recovery of her terce as she would have had on obtaining a decree of service to terce according to the then existing law and practice (s. 21 (2)).<sup>7</sup>

#### SECTION 6.—BRIEF OF DIVISION.

926. This was used for the purpose of settling the rights of heirs portioners, or of adjudgers who had attached the same property and were entitled to rank *pari passu*, or of several widows with separate

<sup>1</sup> *A. B. v. C. B.*, 1890, 18 R. 90; 1891, 18 R. (H.L.) 41.

<sup>2</sup> Mackay, *Prac.* ii. 300; Manual, p. 500; MacLaren, *Prac.*, p. 151; Shand, *Prac.*, p. 1007; Ersk. i. 7, 49; Stair, iv. 3, 7.

<sup>3</sup> 14 & 15 Geo. V. c. 27.

<sup>4</sup> See Walton, H. & W., 2nd ed., p. 229.

<sup>5</sup> 1503, c. 77; *Craik v. Penny*, 1891, 19 R. 339.

<sup>6</sup> 14 & 15 Geo. V. c. 27, s. 21.

<sup>7</sup> See Stair, iv. 3, 11; Ersk. ii. 9, 50; M'Laren, *Wills and Succession*, p. 112; Fraser, H. & W. ii. 1101; Walton, H. & W., p. 228.



rights to terce over the same lands, and in general, of all persons jointly interested in the division of heritable property. The brieve was directed to the Sheriff of the county where the lands lay, and was proclaimed at the market cross. A jury of fifteen, sitting under the Sheriff, valued and divided the subjects with the assistance of land surveyors and valuers, and the shares falling to each claimant were then determined by lot, the division being fixed by the decree.<sup>1</sup> The brieve of division has for long been superseded by action of declarator, the last reported instance of its use being in *M'Neight v. Lockhart*.<sup>2</sup> See DIVISION AND SALE.

#### SECTION 7.—BRIEVES OF LINING AND PERAMBULATION.

927. These briefs have also fallen completely into disuse. The former were used for the purpose of settling the boundaries of burghal tenements, and the latter for fixing the marches of other lands. Their place has been taken by actions of declarator.<sup>3</sup>

#### SECTION 8.—REVIEW IN PROCEDURE BY BRIEVE.

928. In petitions for service, which have now taken the place of briefs, appeal may be taken to the Court of Session, either for jury trial,<sup>4</sup> or for review of the Sheriff's judgment when he refuses to serve, or repels objections of an opposing party.<sup>5</sup> In cases in which procedure by brieve is still competent, appeal may be taken to the Court of Session at any time before the verdict is pronounced, or possibly before extract ;<sup>6</sup> thereafter, reduction is the only method of review.<sup>7</sup>

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<sup>1</sup> See Stair, iv. 3, 12 ; Bell, Prin., p. 1081 ; Mackay, Prac. i. 268, Manual, p. 68 ; Shand, Prac. ii. 605.

<sup>2</sup> 1843, 6 D. 128.

<sup>3</sup> See Stair, iv. 3, 13, 14 ; Ersk. iv. i. 48.

<sup>4</sup> 31 & 32 Vict. c. 101, s. 41.

<sup>5</sup> *Ibid.*, s. 42.

<sup>6</sup> *Craik v. Penny*, 1891, 19 R. 339.

<sup>7</sup> *Matthew v. Wighton's Trs.*, 1843, 6 D. 305. See Mackay, Prac. i. 268, Manual, pp. 68, 118 ; Maclaren, Prac., p. 151.

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## BRITISH SHIP.

See SHIP; JURISDICTION.

## BRITISH SUBJECT.

*See* ALIENS.

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## BROCAGE.

*See* CONTRACT.

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## BROCARD.

*See* MAXIMS.

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## BROKER.

*See* AGENCY; INSURANCE, MARINE; SHIPBROKER;  
STOCK EXCHANGE.

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## BROTHEL.

*See* CRIME.

# BUILDING AND ENGINEERING CONTRACTS.

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## SECTION 1.—INTRODUCTION

929. These are important examples of executory contracts. The term “ building contract ” is usually confined to contracts for the erection of houses under the supervision of an architect. Contracts for the execution of other constructive works—for example, railways, canals, docks, and drainage—are known as engineering contracts. These contracts generally involve much detail, and they are almost invariably carried on at the sight, not of the person for whom the work is being done, but of his skilled adviser, the architect in the building contract, and the engineer—properly the civil engineer—in the engineering contract, the scope of whose discretion must vary with the circumstances. It is therefore advisable that the rights and powers of the parties concerned should not be left to implication of law, but should be carefully defined in writing.<sup>1</sup> The person for whom the work is done is referred to as the building owner or employer, though, as need hardly be pointed out, the contract is not one strictly of employment, *i.e.* of master and servant.

## SECTION 2.—QUALIFICATIONS OF ARCHITECTS, ENGINEERS, AND SURVEYORS.

930. Neither an architect nor an engineer requires any legally specified qualification or any licence in order to practise as such. A surveyor

<sup>1</sup> See, on the whole subject, Hudson on Building Contracts, 4th ed. (1914) ; Bell's Prin., 149–152.

is in the same position except that in order to act as a valuator or appraiser he requires a licence.<sup>1</sup> But in order to act as a quantity surveyor—the function of a surveyor which is of importance in building contracts—no licence is required. There are in each of these professions voluntary associations membership of which ensures a certain educational equipment and professional standing. These associations issue regulations for the direction of their members affecting not only their internal relations but also their relations with their clients. Some of them also draw up forms of agreements and schedules of conditions. These regulations and forms have come to be incorporated in whole or part into contracts. But unless and until the matters dealt with in these regulations come to the position of legal custom, such regulations can only be made effective by being incorporated like other conditions in the contract.

**931.** One who desires the title of an Ordained Surveyor in Edinburgh presents a petition to the sheriff or the magistrates setting forth his qualifications and craving to be ordained a surveyor. The applicant is remitted to two named surveyors to examine him in his knowledge of the business. If their report be satisfactory, the oath *de fidei* is administered and he receives a certificate entitling him to practise as a surveyor under the title of Ordained Surveyor.

### SECTION 3.—DUTIES OF THE ARCHITECT OR ENGINEER AND OF THE SURVEYOR.

**932.** The first duty of the architect (which term as used here includes both the architect and the engineer) is to advise with his client on the proposed scheme, to examine the site, and, after such survey as may be necessary, to prepare a plan and specification of the works and submit them with an estimate of probable cost to his employer. When these have been approved, he must prepare such further plans and specifications as may be necessary to enable the surveyor to take out the quantities upon which tenders may be made.

**933.** At this stage the services of the surveyor are called for. His function, that of quantity surveying, has been judicially described as “taking out in detail the measurements and quantities from plans prepared by an architect [*in an engineering contract*, an engineer] for the purpose of enabling builders [*in an engineering contract*, contractors] to calculate the amount for which they would execute the plans.”<sup>2</sup> In this way an approximate estimate of the amount of labour and material, which is the necessary basis of the contractor’s offer, is made once for all for submission to the contractors invited to tender, instead of each offerer being under the necessity at great waste of expenditure of taking out the quantities for himself. The finished work which the surveyor supplies is called a Bill of Quantities. It is in the form of a

<sup>1</sup> 46 Geo. III. c. 43, ss. 4 and 7, and 8 & 9 Vict. c. 76, s. 1.

<sup>2</sup> *Taylor v. Hall*, 1869, 4 L.R.C.L. 467, at p. 476.



schedule, giving in detail the quantity of each item of labour and materials required to be done or provided in the execution of the works, with a money column left blank for the offering contractor to fill in his prices.

**934.** The architect ought, for his own protection, to get express authority to ask for tenders. But it is part of his ordinary employment to advise as to the contractors who should be invited to tender, and generally to look after the receipt and scrutiny of the tenders and the selection of the contractor to do the work. The substance of the tender is the filling in of the money columns in the bill of quantities. The acceptance of a tender constitutes the contract.<sup>1</sup>

**935.** During the execution of the works the architect has the duty of superintending the work of the contractor. He should advise his employer as to whether it is necessary to have an inspector constantly on the spot. His duties of supervision are more fully dealt with later.<sup>2</sup>

**936.** If the price is to be fixed by measurement according to the schedule of prices,<sup>3</sup> it is proper in contracts of any magnitude to have the finished work measured by a surveyor. The architect should obtain express authority to employ the surveyor so as to obviate dispute as to the employer's liability for his charge.<sup>4</sup>

#### SECTION 4.—PAYMENT AND LIABILITY OF THE ARCHITECT OR ENGINEER.

**937.** It is to be presumed that an architect professionally employed does not work for nothing,<sup>5</sup> but his remuneration should be provided for in the contract. It is usually a percentage of 5 per centum upon the cost of the works executed. If the works be not gone on with, then, unless the architect's work is probationary or competitive, and in any case if it is used at all, he will be entitled to payment for his work at the ordinary rates.<sup>6</sup>

**938.** If the architect is negligent in carrying out the duties owed by him to the building owner he renders himself liable in damages.<sup>7</sup> But if he is exercising the function of an arbiter he is not liable for negligence.<sup>8</sup> According to the judges who decided *Chambers v. Goldthorpe* (A. L. Smith M.R., and Collins L.J.), he acts as arbiter whenever he is "bound to exercise his judgment impartially as between the two parties to the building contract."<sup>9</sup> This would apparently apply to every case of granting a certificate binding on the parties. L.J. Romer dissented, holding that one who has undertaken to estimate work to be done for a principal does not, as regards the principal, come to be in the position of an arbiter because a third party has agreed with the principal that his decision shall be binding.

<sup>1</sup> See para. 942, *infra*.

<sup>2</sup> See para. 945, *infra*.

<sup>3</sup> See para. 960, *infra*.

<sup>4</sup> Hudson on Building Contracts, i. 115-122.

<sup>5</sup> *Landless v. Wilson*, 1880, 8 R. 289.

<sup>6</sup> Hudson on Building Contracts, i. 87-89; *Landless v. Wilson*, *cit.*

<sup>7</sup> *Jameson v. Simon*, 1899, 1 F. 1211; *Chambers v. Goldthorpe*, [1901] 1 K.B. 624.

<sup>8</sup> *Chambers v. Goldthorpe*, *cit.*

<sup>9</sup> Per Collins L.J., p. 638.

## SECTION 5.—EMPLOYMENT, PAYMENT, AND LIABILITY OF SURVEYOR.

939. When the plans of an architect or engineer have been approved and he is instructed to go on with the work, this amounts to an authority to him to employ a surveyor.<sup>1</sup> The architect may employ himself to measure, but this is not the common practice.<sup>2</sup>

940. A surveyor employed through an architect having the necessary authority has a claim for payment of his fees against the employer of the architect.<sup>3</sup> It has been held in England that provided the bill of quantities bears a memorandum to the effect that the builder or contractor shall pay the quantity surveyor, then by custom, when once the tender is accepted, not only does the successful builder or contractor become liable for the surveyor's fees, but the employer is not liable.<sup>4</sup> This, however, has not been decided in Scotland, and does not appear reconcilable with *Black v. Cornelius*,<sup>5</sup> *Beattie v. Gilroy*,<sup>5</sup> or *Priestly v. Stone*,<sup>6</sup> according to which there is no contractual relation between contractor and surveyor. If it is intended that the builder should pay the quantity surveyor, a memorandum should be included in the schedule to the effect that the builder must allow a percentage for this charge in his total estimate. The usual rate of commission is from 1 to 2½ per centum. The expense of lithographing the bill of quantities is allowed over and above this.<sup>7</sup>

941. The delivery to a builder of a bill of quantities to enable him to tender thereon does not imply a guarantee that the quantities are correct.<sup>8</sup> Apart from fraud, the surveyor is not liable to the builder for inaccuracies in quantities.<sup>9</sup>

## SECTION 6.—CONSTITUTION OF THE CONTRACT.

942. There is no form necessary in law for the constitution of a building or an engineering contract. But it is practically essential in a case of any importance that the conditions of the bargain should be stated in writing. The contract is usually entered into by the particular form of offer and acceptance before described. The acceptance of the tender completes the contract. A formal minute of agreement, containing the conditions upon which the work is to be done, may thereafter be entered into, and if that is done reference to the prior documents—*e.g.* the tender—will be excluded.<sup>10</sup> But usually the specification contains a statement of these conditions as well as of the work to be

<sup>1</sup> *Black v. Cornelius*, 1879, 6 R. 581, cf. *Knox & Robb v. Scottish Garden Suburb Co., Ltd.*, 1913, S.C. 872; see also Hudson on Building Contracts, i. 105 *et seqq.*

<sup>2</sup> *Beattie v. Gilroy*, 1882, 10 R. 226.

<sup>3</sup> *Black v. Cornelius*, *cit.*; *Beattie v. Gilroy*, *cit.* (extras).

<sup>4</sup> *North v. Bassett*, [1892] 1 Q.B. 333; *Young v. Smith*, 1880, Hudson on Building Contracts, ii. 70.

<sup>5</sup> *Cit.*

<sup>6</sup> *Infra.*

<sup>7</sup> Hudson on Building Contracts, i. 114.

<sup>8</sup> *Young v. Blake*, 1887, Hudson on Building Contracts, ii. 110; *Scrivener v. Pask*, 1866, L.R. 1 C.P. 715.

<sup>9</sup> *Priestly v. Stone*, 1888, Hudson on Building Contracts, ii. 134.

<sup>10</sup> *Kinlen v. Ennis District Council*, [1916] 2 I.R. 299.

done, and in that case a formal minute is unnecessary, unless it is desired to modify the terms of the specification.<sup>1</sup>

#### SECTION 7.—PROVISIONS OF THE CONTRACT.

**943.** For forms of clauses reference should be made to Hudson on Building Contracts,<sup>2</sup> and to the reports of the decided cases, almost all of which involve questions of construction. The following are matters which will ordinarily have to be provided for.

##### SUBSECTION (1).—*The Works.*

**944.** In addition to a specific statement of the work itself, provision should be made for the following matters :—That the contractor (1) should personally superintend the work, (2) in executing it should comply with any statutes regarding it, (3) should erect necessary hoardings, (4) should be responsible for the position, levels, and dimensions of the works in setting out the same, and (5) should do everything to complete the works. The invitation to tender upon plans and specifications implies a guarantee that the work may lawfully be done,<sup>3</sup> but no guarantee that the work can be executed according to the plans and specifications.<sup>4</sup> On the other hand this contract, like other contracts, must be performed in accordance with its terms : but whether deviations in matters of detail are to be treated as breaches of contract, or may without putting an end to all claim upon the contract be treated as matters for deductions from the contract price, should probably be regarded as an open question.<sup>5</sup>

##### SUBSECTION (2).—*Powers of Supervision of Architect or Engineer.*

**945.** It should be provided generally that the work is to be done to the satisfaction of the architect, and in particular that he shall have power to inspect and to appoint a fixed number of inspectors, and how far he shall have power to require materials to be tested or weighed, and to require work to be pulled down or opened up for the purpose of inspection. The duties of resident engineers in engineering contracts and of clerks of works in building contracts should be specified.<sup>6</sup>

<sup>1</sup> For examples of these forms, see *M'Elroy v. Tharsis Sulphur and Copper Co.*, 1877, 5 R. 161, 1878, 5 R. (H.L.) 171 ; *Goodwins, Jardine & Co. v. Brand*, 1905, 7 F. 995.

<sup>2</sup> ii. 487.

<sup>3</sup> *Porter v. Tottenham Urban Council*, [1915] 1 K.B. 776, per Buckley and Phillimore LL.JJ., 785, 790.

<sup>4</sup> *Thorn v. Lord Mayor of London*, 1876, 1 App. Ca. 120 ; see also as to Bills of Quantities, section 4.

<sup>5</sup> *Ramsay & Son v. Brand*, 1898, 25 R. 1212 ; *Steel v. Young*, 1907 S.C. 360 ; *M'Morran v. Morrison & Co.*, O.H. 1906, 14 S.L.T. 578 ; cf. *Forrest v. Scottish County Investment Co.*, 1916 S.C. (H.L.) 28, per Buckmaster L.C.

<sup>6</sup> See *Rio Janeiro Flour Mills v. De Morgan, Snell & Co.*, 1891–2, 8 T.L.R. 108, 292 ; Hudson on Building Contracts, ii. 185.



**946.** The discretion thus conferred upon the architect does not empower him to alter what is matter of contract between the parties.<sup>1</sup> "His authority is to control the performance of the contract, not to make or vary it."<sup>2</sup> He "has no authority to dispense with performance of the express terms of the contract. His approval only applies to the method of fulfilling the express provisions of the contract."<sup>3</sup> But the architect has power to authorise deviations in details of constructional arrangement.<sup>4</sup> In a case where the work was to be done to the satisfaction of the proprietor or architect with power to order variations, but the contract contained no certificate clause, arbitration clause, or clause as to extras being ordered only in writing, and the work was in fact carried out at the sight of the architect, it was held that the employer could not dispute his architect's final certificate as to the amount of work done except on the question whether in point of fact certain extras had been ordered.<sup>5</sup>

SUBSECTION (3).—*Extras: Deviations.*

**947.** The contract should be as specific as possible as to the work which the contract price is to cover, for when, as frequently happens, unforeseen practical difficulties arise in the execution of the work, disputes are apt to arise as to whether the work occasioned by such difficulties is properly an extra or is a matter of which the contractor has taken the risk.<sup>6</sup> That which comes fairly under the contract is not extra work, though it has not been expressly specified.<sup>7</sup> But work may arise so peculiar and unexpected as not to be within the contract at all, in which case it may be that the contractor is entitled to refuse to go on with the contract, or after notice to go on and claim *quantum meruit*.<sup>8</sup>

**948.** To prevent such disputes, it is usual that the engineer's power as supervisor should be enlarged by an express power to order extras and deviations, subject to a proviso that the contractor shall not be entitled to payment as for an extra unless a written order for the extra charged for shall have been given to him. A simple reservation of power to increase, lessen, or omit any part of the work should not be relied on for this purpose.<sup>9</sup> The whole matter should be dealt with

<sup>1</sup> *Steel v. Young*, 1907 S.C. 360.

<sup>2</sup> *Forrest v. Scottish County Investment Co.*, 1916 S.C. (H.L.) 28, per L. Wrenbury.

<sup>3</sup> *Ramsay & Son v. Brand*, 1898, 25 R. 1212, per L.P. Robertson.

<sup>4</sup> *Forrest v. Scottish County Investment Co.*, *supra*.

<sup>5</sup> *Robertson v. Jarvie*, 1908, 15 S.L.T. 703.

<sup>6</sup> *Sharpe v. San Paolo Railway*, 1884, L.R. 8 Ch. 597; *Wilson v. Wallace*, 1859, 21 D. 507; *Macbean v. Napier*, 1870, 8 S.L.R. 250; *Thorn v. Lord Mayor of London*, 1876, 1 App. Ca. 120; *Scott & Murie v. Hatton*, 1827, 6 S. 233—Custom.

<sup>7</sup> *Sharpe v. San Paolo Railway*, *cit.*; *Wilson v. Wallace*, *cit.*

<sup>8</sup> *Thorn v. Lord Mayor of London*, *cit.*, per Cairns L.C., pp. 127–8; see also *Smail v. Potts*, 1847, 9 D. 1043, and *Quin v. Gardner & Sons*, 1888, 15 R. 776, on which see *Boyd & Forrest v. Glasgow and South-Western Railway Co.*, *infra*, 501 and 524; *Mackay v. Lord Advocate*, (O.H.) 1914, 1 S.L.T. 33; *Boyd & Forrest v. Glasgow and South-Western Railway Co.*, 1914 S.C. 472—in the H. of L., 1915 S.C. (H.L.) 20, this view was not maintained.

<sup>9</sup> Cf. *Buckmaster L.C.*, p. 32, and L. Parmoor, p. 37, in *Forrest v. Scottish County Investment Co.*, *cit.*



expressly. For the contractor's protection it should be provided that he shall be entitled to have it decided, if necessary by arbitration, before he proceeds to execute any piece of work which he considers to be an extra, whether it is to be held as an extra or not. If the state of the works does not afford time for this, it would appear that his best course is to insist absolutely upon a written order as for an extra, reserving the question whether he is to be paid as for an extra. For under a proper stipulation for written orders, a certificate by the engineer that work which is extra has been done, is not equivalent to an order.<sup>1</sup> In *Brodie v. Cardiff Corporation*<sup>2</sup> the contract contained a provision that extras might be charged for only if ordered in writing, and also an arbitration clause which was held to extend to the question whether any particular works were extras or not. Certain works were executed in the course of the operations on the demand of the engineer without a written order, the parties being at issue as to whether the matters so executed were extras or not. After the works were completed the parties went to arbitration on the question whether there were any extras to be paid for as such or not, and the arbiter held that they were. The House of Lords (Lord Sumner dissenting) held that in these circumstances the arbiter had power to award that the items in question should be paid for as extras, rejecting the view that as the arbiter could only determine the rights of parties in accordance with the contract, and as under the contract a written order was a condition precedent to a claim for extras, the arbiter had no power in the absence of any such order to make an award for extras.

SUBSECTION (4).—*Certificate Clause: Arbitration.*

**949.** These topics are theoretically distinct. The purpose of the certificate clause is to provide (1) that the work shall only be paid for on a certificate by the employer's engineer that it has been done, and (2) that the certificate shall be conclusive and binding upon both parties as to the work having been done and the amounts and sufficiency thereof. This provision *prima facie* makes the obtaining of a certificate a condition precedent to a demand for payment. The arbitration clause, on the contrary, is intended for the settlement of disputes and differences. But as the cases shew, it is not easy to distinguish between the matters for the sole discretion of the engineer and the matters for arbitration. Moreover, the question whether a certificate should be granted may cover every possible ground of difference between the parties.

**950.** In *Eaglesham v. M'Master*<sup>3</sup> the contractor sued the employer for a balance which the architect refused to certify. There was a clause clearly

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<sup>1</sup> *M'Elroy & Sons v. Tharsis Sulphur and Copper Co.*, 1877, 5 R. 161; 1878, 5 R. (H.L.) 171.

<sup>2</sup> [1919] A.C. 337; see also *Molloy v. Liebe*, 1910, 102 L.T. 616.

<sup>3</sup> [1920] 2 K.B. 169.

making the certificate a condition precedent, but the pursuer relied on a clause which made the architect arbitrator to decide all disputes arising during the progress of the works, as destroying the finality of the certificate. The Lord Chief Justice (Reading) found the pursuer not entitled to maintain the action, holding that the arbitration clause meant that the architect before granting a certificate should hear parties and consider their differences, but did not remove the effect of the clause which made the certificate a precedent. In *Robertson v. Gerrard*<sup>1</sup> the circumstances were similar, but the reference was to an independent third party, a differentiation which in *Eaglesham v. M'Master*<sup>2</sup> the Lord Chief Justice noted as important. Lord Mackenzie held that while a certificate by the architect as a practical man, that work to such an amount had been done, could not have been touched, yet when the architect refused to issue any certificate, the question whether the pursuers could in the circumstances get payment without one was for the arbiter.<sup>3</sup>

**951.** The question of the finality of the certificate once granted was raised in *Lloyd Brothers v. Millward*<sup>4</sup> and *Robins v. Goddard*.<sup>5</sup> In each case the action was at the instance of the contractor against the employer. In the former case a finality clause as to the certificate and a clause of reference to an independent third party were read together so as to make the arbitration clause a proviso upon the certificate clause to the effect that, while certain matters were absolutely reserved to the architect, if in regard to any other matter overt dispute had arisen before the architect had given his final certificate, his power to give it was taken away. In the latter case it was held that the arbitration clause was so wide in its terms as to destroy the finality of the certificate. It is to be noted that the certificate clause itself in that case contained words which threw considerable doubt on the finality of the certificate, and this is founded on by Stirling L.J. But the ratio of the decision was, in the words of Collins M.R., that "if something which purports to be conclusive is made subject to revision it loses its quality of finality."

**952.** Even when the engineer is acting under an arbitration clause he is not bound to proceed as in a formal arbitration.<sup>6</sup> But the last rubric to *North British Railway Co. v. Wilson*<sup>6</sup> seems to be somewhat widely expressed, and is properly applicable only to the case there raised of the giving of a certificate as to progress or completion of work. The words of Lord Justice-Clerk Inglis in *Trowsdale & Son v. North British Railway Co.*<sup>7</sup> refer only to the substitution by the engineer of his own knowledge for evidence. When the engineer is given power to arbitrate and a dispute is brought to his notice, it would appear that he must in some form consider the contentions of parties.<sup>8</sup>

**953.** Under a building contract in the form issued by the Royal

<sup>1</sup> 1908, (O.H.) 16 S.L.T. 100.

<sup>2</sup> [1920] 2 K.B. 169.

<sup>3</sup> See also *Brodie v. Cardiff Corporation*, [1919] A.C. 337.

<sup>4</sup> 1895, Hudson on Building Contracts, ii. 262.

<sup>5</sup> [1905] 1 K.B. 294.

<sup>6</sup> *North British Railway Co. v. Wilson*, 1911 S.C. 730, and cases there cited.

<sup>7</sup> 1864, 2 M. 1334.

<sup>8</sup> *Eaglesham v. M'Master*, *cit.*, per Reading C.J., 174.

Institute of British Architects the builder had the right in certain events to determine the contract so far as he was concerned and to recover from the building owner payment for work executed. Any difference on this matter was referred to arbitration, with the proviso that "such reference . . . shall not be opened until after the completion of the works." The builder in a certain contract, having justifiably determined his work, proceeded to arbitration and obtained an award while the contract works were still uncompleted. The Court of Appeal held that the words "completion of the works" referred to the works contracted for, and not merely to such work as in the circumstances the builder was bound to perform, and were therefore of opinion that the arbitration was premature. The Court did not, however, set aside the award, but merely refused an order for its enforcement under the English Arbitration Act of 1889.<sup>1</sup>

**954.** The necessity for and finality of a certificate are always subject to this, that the giving of it must not be unfairly interfered with by the employer, and that it must be honestly given by the engineer.<sup>2</sup>

#### SUBSECTION (5).—*Settlement of Accounts.*

**955.** If work ostensibly within the contract has been taken over with the approval of the engineer and paid for, the matter cannot be opened up even if the execution of the work is such as to amount in effect to a breach of contract.<sup>3</sup> Where it was discovered before the completion of a contract that certain portions which had been taken over and paid for without objection on the part of the employer's inspector were disconform to contract, it was held that the contractor was not entitled to the balance of the contract price, but that the employer was not entitled to implement or damages.<sup>4</sup>

#### SUBSECTION (6).—*Commencement and Completion of Work.*

**956.** This clause should provide for (1) the time of beginning work, (2) that at which it is to be completed, and, if necessary, (3) the periods at which various stages are to be completed. It should also deal with (4) extensions of time, and (5) the conditions under which the employer may suspend operations, and (6) should provide penalties in case the time stipulated is not kept. Provision should also be made as to whether the ordering of extras is to exclude such penalties, and how it is to be decided whether they have been so excluded.<sup>5</sup> A stipulation that the contractor is to be at liberty to enter upon the lands forthwith or at a time stated does not imply a warranty that the contractor shall

<sup>1</sup> *Smith v. Martin*, [1925] 1 K.B. 745; 52 & 53 Vict. c. 49, s. 12.

<sup>2</sup> Hudson on Building Contracts, i. 412 *et seqq.*

<sup>3</sup> *Ayr Road Trustees v. Adams*, 1883, 11 R. 326; see *Peddie v. Henderson*, 1869, 6 S.L.R. 608; *Macbean v. Napier*, 1870, 8 S.L.R. 250.

<sup>4</sup> *Muldoon v. Pringle*, 1882, 9 R. 915.

<sup>5</sup> See *Gallivan v. Killarney Urban District Council*, [1912] 2 I.R. 356.



be at liberty to work upon the land without interruption. Therefore when a third person caused delay to the contractor by wrongful threats of interdict against his access it was held that the employer was not liable.<sup>1</sup> On the other hand, prolonged delay in giving access to the site may so change the conditions of the contract as to make its provisions inapplicable and give the contractor right to a *quantum meruit*.<sup>2</sup> Also if a contractor, after he has partly performed his contract, is wrongfully excluded from the lands on which it is to be executed, he may treat it as at an end and sue for what he has done.<sup>3</sup> If the contractor fails to complete the work in the stipulated time, the onus is upon him to show that this is due to the act or omission of the employer, particularly if there is a provision in the contract for the issue by the architect of certificates sanctioning delay, and these have not been applied for.<sup>4</sup> But even if the employer is made the judge of the sufficiency of any alleged reason for delay, the contractor will not be held liable for delay actually due to the employer's act or default.<sup>5</sup>

957. The assessment of damage for delay is frequently matter of stipulation. When this is done, the question whether the sum so ascertained is subject to modification or not is one to be decided on the construction of the contract as a whole.<sup>6</sup> Failure to perform an executory contract within the period stipulated, or failing that within a reasonable time, is in general regarded not as justifying rescission, but as giving rise to a claim of damages which may be compensated *ope exceptionis* against a claim for the sum payable under the contract.<sup>7</sup>

#### SUBSECTION (7).—*Maintenance.*

958. Provision should be made as to the period for which the contractor is to maintain the works after completion, and as to the person—be it the engineer or an arbiter—to whose satisfaction he is to maintain them, and also as to the contractor's liability to repair and to make good defects, and the degree of specification to be given in any requisition to repair. In connection with the maintenance of a road, it has been held that an obligation to repair should be enforced by an action of declarator and implement, with an alternative conclusion that the repairs should be carried out at the sight of the Court. The person in right of the obligation is not entitled to repair and sue for the cost.<sup>8</sup>

<sup>1</sup> *Porter v. Tottenham Urban Council*, [1915] 1 K.B. 776.

<sup>2</sup> *Bush v. Whitehaven Trustees*, 1888, Hudson on Building Contracts, ii. 122.

<sup>3</sup> *Lodder v. Slowey*, [1904] A.C. 442.

<sup>4</sup> *Steel v. Bell*, 1900, 3 F. 319.

<sup>5</sup> *Wells v. Army and Navy Co-operative Society, Ltd.*, 1902, 86 L.T. 764.

<sup>6</sup> *Bell*, Prin., s. 149; *Johnston v. Robertson*, 1861, 23 D. 646; *Forrest & Bar v. Henderson, Coulborn & Co.*, 1869, 8 M. 187; see also *Clydebank Engineering and Shipbuilding Co. v. Don José Ramos Yzquierdo y Castaneda*, 1904, 7 F. (H.L.) 77.

<sup>7</sup> *British Motor Body Co., Ltd. v. Thos. Shaw (Dundee), Ltd.*, 1914 S.C. 922; *Macbride v. Hamilton & Son*, 1875, 2 R. 775.

<sup>8</sup> *Commissioners of Northern Lighthouses v. Edmonston*, 1908, 16 S.L.T. 439.



SUBSECTION (8).—*Payment of the Contract Price.*

**959.** It is usual to provide that a certificate by the engineer as to the amount of work done shall be a condition precedent to all payments to the contractor.<sup>1</sup> Special provision should be made as to the periods and amounts of advances to be made, either generally to account of the price or against plant, materials, alterations, or extras. It should also be provided how much of the price is to be paid on completion of the works, and how much reserved till the end of the period of maintenance. The contractor should be taken bound to assist in the operation of measuring, and to keep the necessary apparatus in order to the satisfaction of the engineer.

**960.** Payment may be by a slump sum or by measurement according to scheduled rates. When payment is to be made by measurement, a total sum named in the estimate as that for which the work is to be done is not conclusive, but is to be regarded merely as an expression of opinion as to what the work will cost.<sup>2</sup> And it has been decided that this holds even when the offer and acceptance have been followed by a minute of agreement bearing that the work is to be done for the sum named, but also proceeding upon a narrative of the specification and acceptance.<sup>3</sup> It may be doubted whether the last decision is reconcilable with the general law of contract regarding reference to prior communings.<sup>4</sup> In a case in which work was to be done by a railway company for another party and the amount payable was made to depend on certain costs as determined by the railway company's engineer, it was held that the company were nevertheless bound to submit a reasonably detailed statement of their costs and charges which the other party could check.<sup>5</sup>

**961.** When it is provided that payments shall be made to the builder on account as the work proceeds, a deduction known as *retention money* is usually made from all such payments. In small contracts this usually amounts to 20 or 25 per cent. But as contracts increase in amount this deduction is only made until the amount kept in hand by the employer is sufficient for the purpose of his security. Thus, supposing a contract be for £2000, 20 per cent., or £400, would be only a reasonable sum to retain; but if the contract amounts to £20,000, then 20 per cent., or £4000, retention money might be unnecessary. In large contracts it is provided, as a rule, that 20 or 25 per cent. shall be retained until the retention money amounts to a sufficient sum, and that the contractor shall be paid the amount of further certificates in full.

**962.** This retention money is generally kept by the employer until the work is completed, when a portion of it, say half, is released and

<sup>1</sup> Para. 949, *supra*.

<sup>2</sup> *Jamieson v. M'Innes*, 1887, 15 R. 17; *Robertson v. Jarvie*, 1908, 15 S.L.T. 703, per Lord M'Laren.

<sup>3</sup> *Wilkie v. Hamilton Lodging House Co., Ltd.*, 1902, 4 F. 951.

<sup>4</sup> *Kinlen v. Ennis District Council*, [1916] 2 I.R. 299; Gloag on Contract, 388.

<sup>5</sup> *North British Railway Co. v. Wilson*, 1911 S.C. 730.

paid over to the contractor, the balance being either retained until the expiration of the period of maintenance, or paid in instalments during that period, subject, of course, to reduction in case the contractor fails in any respect to maintain the work. Under a contract by which 80 per centum was to be paid on the engineer's progress certificate, 15 per centum when the whole works were certified as complete, and the balance of 5 per centum within six months of the delivery of the completed works to the undertaker, it was held on the construction of a charge upon the retention money that the whole 20 per centum kept back was intended to be included therein.<sup>1</sup> It has been held that when the execution of a contract was in accordance with its terms taken out of the hands of a contractor and a new contract entered into for the carrying out of the works, the whole unpaid part of the price, including retention money against parts executed by the first contractor, was payable on completion of the contract to the party who had taken it over.<sup>2</sup>

#### SUBSECTION (9).—*Payment of Extras.*

**963.** A matter which often causes considerable dispute is the time when extra work should be paid for. There should therefore be an express provision in the contract applicable to such work, to the effect that it should be paid for, either on completion of the extra work itself or upon completion of the whole contract. Extra work contemplated by the contract is to be paid for at contract rates,<sup>3</sup> but when more has been done than has been bargained for, the employer is not bound to take it unless the excess is slight or unavoidable.<sup>4</sup>

**964.** Extras and deviations have to be measured up in order to be charged for. It is advisable that the engineer should take express authority from his employer to obtain the services of a measurer for this purpose.<sup>5</sup> When measurements of extras or deviations have to be taken, the claim of the measurer for his fee is against the employer and not against the contractor.<sup>6</sup>

#### SUBSECTION (10).—*Property in Plant and Material.*

**965.** It should be provided that all plant and material, whether supplied by the employer or by the contractor, and all material on the site, shall, during the execution of the contract, be the property of the employer, and shall not be removable by the contractor without the leave of the engineer. The purpose of such a provision is that, if the builder should become bankrupt, the right of the employer to the materials cannot be defeated by the trustee in bankruptcy. In order that this purpose may be effected, it is advisable that the contract

<sup>1</sup> *West Yorkshire Bank v. Isherwood*, 1912, 28 T.L.R. 593.

<sup>2</sup> *M'Mahon v. O'Neill*, [1915] 2 I.R. 384.

<sup>3</sup> *Thorn v. Lord Mayor of London*, *cit.*

<sup>5</sup> See para. 936, *supra*.

<sup>4</sup> Bell, *Prin.*, s. 149.

<sup>6</sup> *Beattie v. Gilroy*, 1882, 10 R. 226.

should provide for the absolute sale to the employer of each consignment of material,<sup>1</sup> for under a sale the property now passes in accordance with the intention of parties.<sup>2</sup> It is at least questionable if in most contracts of this sort there would be delivery to support a security over moveables in favour of the employer; for, though the articles are placed on the employer's ground, it is the contractor who is in actual occupation of the ground and in possession of the plant and material. This point was mooted in the case of *Kerr v. Dundee Gas Co.*<sup>3</sup> In that case there were no operative stipulations as to the property of materials or tools provided by the contractor. The contractor became bankrupt after he had done a small part of the work and had placed on the ground certain tools and a quantity of material above what he had used. The employer had the contract completed by another contractor. The first contractor's trustee sued for a sum in respect of the work done and the price of the material and tools. The employer *inter alia* pleaded compensation in respect of damages for breach of contract. It was held that the defender was entitled (1) to have the material applied to the purpose of the contract, and (2) to have the tools used in the execution of the contract; and that the pursuer was entitled to be paid (1) for his work, (2) for the material, and (3) for the use of the tools, but that the defender was entitled to plead compensation as against these three claims. It was also found that the pursuer was entitled to have had the tools returned to him at the end of the contract, that the defender's failure to return them then was a wrong, that the pursuer was entitled to payment of their value as at that date, and that against this claim the defender had no right of compensation. As to whether the material became the property of the owner on being brought on to the ground there was a difference of opinion on the bench.

#### SUBSECTION (11).—*Bankruptcy of Contractor.*

**966.** It should be provided that, in case of the contractor becoming insolvent, or being sequestrated, or granting any trust for behoof of his creditors during the currency of the contract, the employer may take over and complete the contract.

#### SUBSECTION (12).—*Assigning and Sub-contracting.*

**967.** It is usual to restrict the power to assign the contract or to sub-contract, so as to confine the execution of the contract to those selected by the employer. When the contractor, under a contract to do work for a lump sum, made a sub-contract in accordance with the

<sup>1</sup> *Gavin's Tr. v. Fraser*, 1920 S.C. 674; *Rennet v. Mathieson*, 1903, 5 F. 591; *Jones & Co.'s Tr. v. Allan*, 1901, 4 F. 374; *Robertson v. Hall's Tr.*, 1896, 24 R. 120; *Liddel's Tr. v. Warr & Co.*, 1893, 20 R. 989.

<sup>2</sup> *Barclay, Curle & Co., Ltd. v. Laing & Sons, Ltd.*, 1908 S.C. 82; *ibid.*, (H.L.) 1; *Gavin's Tr. v. Fraser*, *cit.*

<sup>3</sup> 1861, 23 D. 343.



principal contract, but proved unable to carry out his obligations toward the sub-contractor, it was held that he had contracted with the sub-contractor as a principal and not as agent for the employer, and that the latter was under no obligation to the sub-contractor.<sup>1</sup> The decision in *Young & Co. v. White*<sup>2</sup> was disapproved. It would appear that in *Ramsden v. Carr*<sup>3</sup> the parties supplying certain articles of detail were invited to supply them by the employer's architect.

#### SUBSECTION (13).—*Miscellaneous Provisions.*

**968.** In works of large extent it should be provided to what extent the respective parties are to be liable for damage to third persons and to what extent and by whom the works are to be insured. The contractor is frequently taken bound to provide a sum out of which incidental charges may be paid. It is fairly common to insert provisions regulating the rate of wages to be paid by the contractor to workmen, and the conditions of the workmen's employment. Provision may also be made, if the scale of the work demands it, as to watching and policing. Another incidental matter which should be provided for is the ownership of plans. Apart from stipulation, plans belong to the person for whom they are prepared. An alleged custom that they should belong to the person by whom they have been prepared has been rejected as unreasonable.<sup>4</sup>

#### SECTION 8.—FAILURE TO PERFORM THE CONTRACT.

**969.** The contractor may be in breach of his undertaking by failing to perform the work within a reasonable or the stipulated time, or by failing to perform it at all, or by failing to perform it in accordance with the stipulations of the contract. The first case has already been dealt with.<sup>5</sup>

**970.** When the contractor fails to carry through the work which he has undertaken, he has no claim under the contract in respect of the execution of part, though he may of course establish an independent contract to pay for that part.<sup>6</sup> This appears to be the law of Scotland,<sup>7</sup> but it is probably subject to the qualification, as in the case of faulty execution, that the employer must reject the incomplete work or pay for it *quantum lucratus est*.<sup>8</sup> In the case last cited, the plea that the contractor had no right to payment for part performance was stated but was not sustained, the employer having already taken and used the incomplete work.

**971.** If the contractor's failure is due to the perishing of the subject without his fault, there appears to be a distinction between a true

<sup>1</sup> *Hampton v. Glamorgan County Council*, [1917] A.C. 13.

<sup>2</sup> 1911, 28 T.L.R. 87.

<sup>3</sup> 1913, 30 T.L.R. 68.

<sup>4</sup> *Gibbon v. Pease*, [1905] 1 K.B. 810.

<sup>5</sup> Paras. 956-7, *supra*.

<sup>6</sup> *Sumpter v. Hedges*, [1898] 1 Q.B. 673; *Wheeler v. Stratten*, 1912, 105 L.T. 786; *Small & Sons, Ltd. v. Middlesex Real Estates, Ltd.*, [1921] W.N. 245.

<sup>7</sup> *Turnbull v. M'Lean & Co.*, 1874, 1 R. 730.

<sup>8</sup> See *Kerr v. Dundee Gas Co.*, 1861, 23 D. 343.



*locatio operis* and a contract which is in effect an executory sale.<sup>1</sup> In the latter case the whole loss up to the point of delivery falls upon the contractor or seller. But the contracts here in question fall under the former class, in which the loss falls upon the owner, and the contractor is entitled, in case of the works being abandoned, to the contract price under deduction of the estimated cost of the work not executed.<sup>2</sup> But if, notwithstanding a partial destruction of the subjects, the work is carried out, then the contractor is entitled over and above the contract price to the cost of replacing the work destroyed.<sup>3</sup>

972. In two recent cases the doctrine of frustration has been considered in connection with building contracts. The earlier related to a contract made just prior to the outbreak of war for works to occupy about six years. There was a clause giving the engineer power to extend the time in case the contractors should be unduly delayed or impeded. In February 1916, under order of the Ministry of Munitions, the works were stopped and the plant dispersed. In the following May the building owners sued for a declaration that the contract had not been thereby determined, maintaining that the situation was covered by the clause for extension of time. It was held that the interruption was such as to destroy the identity of the work or service, if resumed, with the work or service interrupted, and that the defenders (the contractors) were entitled to succeed in their contention that both parties were released from all further liability under the contract.<sup>4</sup> In *Mertens v. Holms Freeholds Company*<sup>5</sup> the same question of frustration through a prohibitory order during war of the Ministry of Munitions was mooted, but the facts of the case did not raise it; as it was found that the alleged frustration was in fact brought about by the party pleading it through conduct amounting in substance to fraud.

973. The case of *Mertens*,<sup>5</sup> being regarded for the reasons above stated as one of breach of contract by the contractor, the measure of damages assigned was the amount which it reasonably cost the employer to complete the work as contracted for at the earliest moment when he was allowed to proceed, less what would have been due to the contractor had he completed his contract at the time agreed upon.<sup>6</sup>

974. In the third place, a building contract must be performed *modo et forma*. If the builder departs from the specification he loses his right to the contract price without acquiring right to any *quantum meruit*. The employer is entitled to reject the whole work. But if he retains it he must pay for it *quantum lucratus est*.<sup>7</sup> If, however, the deviations are

<sup>1</sup> Bell, Prin., s. 152.

<sup>2</sup> *Richardson v. Dumfries Road Trs.*, 1890, 17 R. 805.

<sup>3</sup> *M'Intyre v. Clow*, 1875, 2 R. 278.

<sup>4</sup> *Metropolitan Water Board v. Dick, Kerr & Co.*, [1918] A.C. 119; see also as to change of conditions, *Bush v. Whitehaven Trs.*, 1888, Hudson on Building Contracts, ii. 122.

<sup>5</sup> [1921] 2 K.B. 526.

<sup>6</sup> See also as to measure of damages, *Seaton Brick and Tile Co., Ltd. v. Mitchell*, 1900, 2 F. 550.

<sup>7</sup> *Ramsay & Son v. Brand*, 1898, 25 R. 1212; *Steel v. Young*, 1907 S.C. 360; and see *Farnsworth v. Gerrard*, 1807, 1 Campbell, 38, Hudson on Building Contracts, i. 280.

slight, the employer may be found liable for the price under deduction of the cost of bringing the work into conformity with the contract.<sup>1</sup>

975. This would appear to be the law as it now stands. But in *Forrest v. Scottish County Investment Co., Ltd.*,<sup>2</sup> Lord Skerrington expressed the opinion that this view of the law required revision and that a contractor deviating in certain matters from the specification was nevertheless entitled to the contract price under deduction of the price of the work in which the deviation had occurred and of any damage which the employer might prove. On this opinion the following observations may with great respect be made. First, it would appear that the cases of *Ramsay & Son v. Brand*<sup>3</sup> and *Steel v. Young*<sup>3</sup> depend not on the doctrine of condition precedent, but on the principle of *Turnbull v. McLean & Co.*<sup>4</sup> Secondly, it is not clear why the exclusion of the right to the contract price should logically exclude the right to payment *quantum lucratus*, for the latter right does not depend upon contract but upon recompense. In the House of Lords Buckmaster L.C. reserved his opinion as to whether *Ramsay & Son v. Brand* instead of being too strict did not err in the opposite direction. In the same case Lord Parmoor developed a suggestion contained in Lord Skerrington's opinion, to the effect that there is a difference as regards separability between lump sum and measurement contracts.<sup>5</sup> Now it seems clear in fact that the execution, say, of the brickwork of a house without setting a roof upon it, no more implements any separable requirement of the employer if it is to be paid by measurement than if it is to be included in a lump price. Thus it is hard to see why the method of payment should make a difference in this respect. Further, if the principle were admitted it would be difficult to set limits to it short of every item of the specification being held separable.

<sup>1</sup> *Ramsay & Son v. Brand*, 1898, 25 R. 1212; *Steel v. Young*, 1907 S.C. 360; and see *Farnsworth v. Gerrard*, 1807, 1 Campbell, 38, Hudson on Building Contracts, i. 280. But see para. 944, *supra*.

<sup>2</sup> 1915 S.C. 115; 1916 S.C. (H.L.) 28.

<sup>3</sup> *Cit.*

<sup>4</sup> 1874, 1 R. 730.

<sup>5</sup> 1915 S.C. 134; 1916 S.C. (H.L.) 35.

## BUILDING REGULATIONS.

*See* DEAN OF GUILD; ROADS AND STREETS.

# BUILDING RESTRICTIONS.

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## SECTION 1.—INTRODUCTION.

976. Restraints imposed upon a proprietor of ground as to the character of the buildings he may erect thereon, or the use to which he may put them, are called building restrictions. Such limitations on the use of property are usually inserted in feu-charters or feu-contracts with a view to secure uniformity in the style of buildings in streets or squares, or to preserve the amenity of a residential district, but they may also be imposed by contracts of ground-annual,<sup>1</sup> or by dispositions.<sup>2</sup> They may be of infinite variety, and are not confined to such conditions as are recognised servitudes existing for the benefit of some dominant tenement. Unlike servitudes, building restrictions have no validity unless they appear on the face of the recorded title.

## SECTION 2.—CONSTITUTION OF RESTRICTIONS.

977. Building restrictions, to be effectual, must be real burdens and not merely personal rights reserved by a disponent against his disponent,<sup>3</sup> and, like other real conditions, they are only effectual if they comply with certain requirements. The law upon this matter is thus stated in the leading case of *Tailors of Aberdeen v. Coutts*.<sup>4</sup> “To constitute a real burden or condition, either in feudal or burgage rights, which is effectual against singular successors, words must be used in the conveyance which clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs alone; and those words must be inserted in the sasine which follows on the conveyance, and of consequence appear on the record. In the next place, the burden or condition must not be contrary to law, nor inconsistent

<sup>1</sup> *Assets Co. v. Ogilvie*, 1897, 24 R. 400; *Bannerman's Trs. v. Howard & Wyndham*, 1902, 39 S.L.R. 445.

<sup>2</sup> *Mactaggart & Co. v. Harrower*, 1906, 8 F. 1101.

<sup>3</sup> *Scottish Temperance Life Assurance Co. v. Law Union and Rock Insurance Co.*, 1917 S.C. 175.

<sup>4</sup> 1834, 13 S. 226; 1 Rob. App. 296, at p. 306.

with the nature of this species of property ; it must not be useless or vexatious ; it must not be contrary to public policy—for example, by tending to impede the commerce of land or create a monopoly.<sup>1</sup> The superior or party in whose favour it is conceived must have an interest to enforce it.”<sup>2</sup> If the requisites mentioned above concur, it is not necessary that the burdens be declared real, that any particular form of words be used, or that the conditions be fenced with irritant and resolute clauses. The words used to create such burdens do not require to be so clear and precise as those necessary to protect a burden of a personal nature, *e.g.* the payment (usually reserved) of money, to which, in the stricter sense, the term real burden is applied. The ground affected must be specified with precision.<sup>3</sup> By the Titles to Land Consolidation (Scotland) Act, 1868,<sup>4</sup> and the Conveyancing (Scotland) Act, 1874,<sup>5</sup> a real condition in a conveyance may validly be created by reference to another deed duly recorded in which the condition is inserted, but not by reference to an unrecorded deed.<sup>6</sup>

### SECTION 3.—REFERENCE TO A PLAN.

978. A common method of imposing these restrictions is by reference to a feuing plan. The mere exhibition of a plan at the date of a sale of the property does not constitute a binding engagement that all shall be done that appears on the face of the plan.<sup>7</sup> Nor is a mere reference to a plan in the charter sufficient. To be effectual, such reference must not be made merely for the purpose of identifying the subject ; and it must be clear that the parties intended the plan to be part and parcel of the contract between them.<sup>8</sup> A plan may, however, be written into a contract though not mentioned therein, *e.g.* where it is specially prepared with a view to delineating the subjects, and is indorsed on the charter and signed by the superior.<sup>9</sup> Where feuars, with a title to object, objected to alterations on a building on the ground that they were disconform to a plan, but the plan had been lost, it was held that, as it was to be presumed that the buildings had been erected in conformity with the plan, it lay on the proprietor proposing alterations to shew that the alterations were not disconform to the plan.<sup>10</sup>

<sup>1</sup> *Yeaman v. Crawford*, 1770, Mor. 14537 ; *Orrock v. Bennet*, 1762, Mor. 15009.

<sup>2</sup> *Morier v. Brownlie & Watson*, 1895, 23 R. 67 ; *Browns v. Burns*, 1823, 2 S. 298.

<sup>3</sup> *Scottish Temperance Life Assurance Co. v. Law Union and Rock Insurance Co.*, 1917 S.C. 175 ; *Anderson v. Dickie*, 1915 S.C. (H.L.) 79.

<sup>4</sup> 31 & 32 Vict. c. 101, s. 10.

<sup>5</sup> 37 & 38 Vict. c. 94, s. 32.

<sup>6</sup> *Liddall v. Duncan*, 1898, 25 R. 1119.

<sup>7</sup> *Heriot's Hospital v. Gibson*, 1814, 2 Dow, 301.

<sup>8</sup> *Butterworth v. Dirom*, 1812, note to 18 F. C. 26 ; 6 Pat. at p. 368 ; *Walker v. Renton*, 1825, 3 S. 650 ; *Barr v. Robertson*, 1854, 16 D. 1049 ; *Trs. of Free St. Mark's Church v. Taylor's Trs.*, 1869, 7 M. 415 ; *Assets Co. v. Lamb & Gibson*, 1896, 23 R. 569.

<sup>9</sup> *Crawford v. Field*, 1874, 2 R. 20.

<sup>10</sup> *Sutherland v. Barbour*, 1887, 15 R. 62.



## SECTION 4.—INTERPRETATION.

**979.** The language employed to constitute building restrictions is strictly interpreted, there being a presumption in favour of freedom of ownership. Hence, if such stipulations are expressed in ambiguous terms, they must be construed *contra proferentem*, that is, against the superior, and in favour of the vassal who is to be limited in the use of his property.<sup>1</sup> On the other hand, if the words imposing restraint are clear and unambiguous, they must receive their full force and effect. In *Millar v. Trs. for the Endowment Committee of the Church of Scotland*<sup>2</sup> a vassal was bound by a restriction in his feu-charter to erect no buildings other than villas or offices. He applied to the Dean of Guild for warrant to erect six contiguous self-contained houses of two storeys, with separate gardens before and behind. The superior having objected, the Court, affirming the decision of the Dean of Guild, held that the proposed buildings were a contravention of the restriction in the charter.<sup>3</sup> Restrictions intended for the mutual benefit of a number of buildings are regarded as specially deserving of a fair construction.<sup>4</sup>

## SECTION 5.—EXAMPLES.

**980.** Building restrictions may take the form of an obligation to conform to a building line,<sup>5</sup> a restriction against building on particular sites,<sup>6</sup> or against buildings of more than a certain height,<sup>7</sup> an obligation to conform to a certain style of buildings<sup>8</sup> (a prohibition of “unseemly” buildings is too vague to be enforceable<sup>9</sup>), to use particular building

<sup>1</sup> *Middleton v. Leslie*, 1894, 21 R. 781; *Miller v. Carmichael*, 1888, 15 R. 991; *Hood v. Traill*, 1884, 12 R. 362; *Dennistoun v. Thomson*, 1872, 11 M. 121 and 127; *Banks & Co. v. Walker*, 1874, 1 R. 981; *Moir's Trs. v. M'Ewan*, 1880, 7 R. 1141; *Assets Co. v. Lamb & Gibson*, 1896, 23 R. 569 (where a vassal sought unsuccessfully to enforce conditions against his superior); *Assets Co. v. Ogilvie*, 1897, 24 R. 400; *Wyllie v. Dunneth*, 1899, 1 F. 982; *The Walker Trs. v. Haldane*, 1902, 4 F. 594; *Kerridge v. Gray*, 1902, 5 F. 283; *Street v. Dobbie*, 1903, 5 F. 941; *Graham v. Shiels*, 1901, 8 S.L.T. 368; *Minister of Prestonpans v. The Heritors*, 1905, 13 S.L.T. 463; *Shand v. Brand*, 1907, 14 S.L.T. 704; *Bainbridge v. Campbell*, 1912 S.C. 92.

<sup>2</sup> 1896, 23 R. 557.

<sup>3</sup> Cf. *Sandeman's Trs. v. Brown*, 1892, 20 R. 210; *Greenhill v. Forrester*, 1824, 3 S. 325; 1825, 4 S. 160; *Partick Police Commissioners v. Great Western Steam Laundry Co.*, 1886, 13 R. 500; *Morrison v. M'Lay*, 1874, 1 R. 1117; *Naismith v. Cairnduff*, 1876, 3 R. 863; *Lawson v. Wilkie*, 1897, 24 R. 649; *The Walker Trs.*, *supra*.

<sup>4</sup> *Dennistoun v. Thomson*, 1872, 11 M. 121; *Thomson v. Alley & Maclellan*, 1882, 10 R. 433.

<sup>5</sup> *Crawford v. Darroch*, 1907 S.C. 703; *Naismith v. Cairnduff*, 1876, 3 R. 863; *Trs. of Free St. Mark's Church v. Taylor's Trs.*, 1869, 7 M. 415; *Dennistoun v. Thomson*, 1872, 11 M. 121.

<sup>6</sup> *Clark & Sons v. School Board of Perth*, 1898, 25 R. 919; *Lawson v. Wilkie*, 1897, 24 R. 649.

<sup>7</sup> *Alexander v. Stobo*, 1871, 9 M. 599; *M'Ewan v. Shaw Stewart*, 1880, 7 R. 682; *Cochran v. Paterson*, 1882, 9 R. 634; *Banks & Co. v. Walker*, 1874, 1 R. 981; *The Walker Trs. v. Haldane*, 1902, 4 F. 594.

<sup>8</sup> *Sandeman's Trs. v. Brown*, 1892, 20 R. 210; *Middleton v. Leslie*, 1894, 21 R. 781; *Assets Co. v. Ogilvie*, 1896, 24 R. 400; *Morrison v. M'Lay*, 1874, 1 R. 1117.

<sup>9</sup> *Murray's Trs. v. Trs. for St. Margaret's Convent*, 1907 S.C. (H.L.) 8.

materials,<sup>1</sup> to erect and maintain "villas,"<sup>2</sup> or self-contained houses,<sup>3</sup> a restriction on the erection of "offices,"<sup>4</sup> on the use of houses except as dwelling-houses,<sup>5</sup> on their use as licensed premises,<sup>6</sup> or for business or trading purposes,<sup>7</sup> or for any purpose likely to cause a nuisance in the neighbourhood.<sup>8</sup> If the obligation be not really *ad factum præstandum*, but resolve itself into the payment of an indefinite sum of money, e.g. to pay two-third parts of the expense of enclosing and forming the area, in the middle of the square in which the premises stood, and of upholding the same in complete repair, it is bad.<sup>9</sup>

#### SECTION 6.—TITLE TO OBJECT TO INFRINGEMENT.

**981.** In the ordinary case, only the superior can enforce conditions of the nature of building restrictions. Such stipulations are regarded as merely conditions of tenure between superior and vassal, and there is no room for the doctrine of *jus quæsitum tertio*. But, under certain circumstances, a feuar may claim the benefit of restrictions contained in the feu-contracts of other feuars. To entitle a tertius, who is not a party to the contract between a vassal or disponee and his superior or author, to enforce a restriction contained in the vassal's or disponee's title, there must be some indication in the title that the restriction should be enforceable by a tertius.<sup>10</sup> It is not sufficient that several feuars of neighbouring plots of building ground in the same street hold from the same superior, even though their titles contain identical restrictions, unless some mutuality and community of rights and obligations be otherwise established between the feuars; and this can only be done (1) by express stipulation in their respective contracts with the superior; (2) by reasonable implication from some reference in both contracts to a common plan or scheme of building; or (3) by mutual agreement

<sup>1</sup> *Beattie v. Ures*, 1876, 3 R. 634; *Waddell v. Campbell*, 1898, 25 R. 456; *Street v. Dobbie*, 1903, 5 F. 941.

<sup>2</sup> *Bainbridge v. Campbell*, 1912 S.C. 92; *Moir's Trs. v. M'Ewan*, 1880, 7 R. 1141; *Millar v. Trs. for Endowment Committee of Church of Scotland*, 1896, 23 R. 557.

<sup>3</sup> *Miller v. Carmichael*, 1888, 15 R. 991; *Buchanan v. Marr*, 1883, 10 R. 936; *Porter v. Campbell's Trs.*, 1923 S.C. (H.L.) 94; *Montgomerie-Fleming's Trs. v. Kennedy*, 1912 S.C. 1307.

<sup>4</sup> *Murison v. Wallace*, 1883, 10 R. 1239; *Wyllie v. Dunnett*, 1899, 1 F. 982; *Colville v. Carrick*, 1883, 10 R. 1241.

<sup>5</sup> *Ewing v. Hastie*, 1878, 5 R. 439; *Colville v. Carrick*, 1883, 10 R. 1241; *Brown v. Crum Ewing's Trs.*, 1918, 1 S.L.T. 340; *Colquhoun's Curator Bonis v. Glen's Tr.*, 1920 S.C. 737.

<sup>6</sup> *E. of Zetland v. Hislop*, 1882, 9 R. (H.L.) 40; *Ewing v. Campbells*, 1877, 5 R. 230; *Menzies v. Caledonian Canal Commissioners*, 1900, 2 F. 953.

<sup>7</sup> *Graham v. Shiels*, 1901, 8 S.L.T. 368; *Gordon v. Campbell's Trs.*, 1902, 10 S.L.T. 315.

<sup>8</sup> *Manson v. Forrest*, 1887, 14 R. 802; *Anderson v. Aberdeen Agricultural Hall*, 1879, 6 R. 901; *North British Railway Co. v. Moore*, 1891, 18 R. 1021; *Sandeman's Trs. v. Brown*, 1892, 20 R. 210.

<sup>9</sup> *Coutts, supra*; *Cockburn v. Heriot's Hospital*, 1825, 4 S. 128, 2 W. & S. 293; *Middleton v. Leslie*, 1894, 21 R. 781; *E. of Zetland v. Hislop*, 1882, 9 R. (H.L.) 40; *Tennant v. Napier Smith's Trs.*, 1888, 15 R. 671; *Marshall's Tr. v. Macneill & Co.*, 1888, 15 R. 762; *Rankine, Landownership*, 4th ed., 464-487.

<sup>10</sup> *Nicholson v. Glasgow Asylum for the Blind*, 1911 S.C. 391.

between the feuars themselves. As put by Lord Watson: "In order to the acquisition of such a *jus quæsitum*, it is essential that the conditions to be enforced shall appear in all the feu-rights, that they shall in all cases be similar, if not identical, and of such a character that each feuar has an interest in enforcing them."<sup>1</sup>

§82. The doctrine thus laid down has been followed in several subsequent cases. In *Calder v. Merchant Company of Edinburgh*<sup>2</sup> it was held that, as the conditions and restrictions of the original feu-contract were not at the date of the action in the titles of all the lands originally feued out thereby, but had been abandoned as to some, the co-feuars had no right to enforce the conditions. In that case the common feuing plan or scheme embraced four acres, the feuars on which constituted the community. The common plan came to an end by the superiors, who had reacquired one of the areas, feuing it out to different feuars on essentially different conditions and restrictions. The result of this action was not to give the other feuars any right or *jus quæsitum* to insist that a common scheme, which should embrace three only of the areas originally feued out, should be maintained. Lord Adam said: "I think all the feuars of the original four areas must be bound, or none. I know no authority for saying that, where a common feuing plan has been abandoned in essential respects *quoad* certain of the feuars, it shall nevertheless continue in force as regards the others." In *Walker & Dick v. Park*<sup>3</sup> A., the superior, began to feue out his estate. In his feu-contract with B. the vassal was taken bound to erect only cottages and villas on the ground, while the superior, on his part, undertook to insert similar conditions in the titles of subsequent feuars. Thereafter A. feued ground to C. by a feu-contract which contained clauses binding the vassal to erect villas only, and obliging the superior to insert similar conditions in the titles of disponees feuing ground to the north of that taken by C. Subsequently, A. and B. discharged each other of the above obligations; and thereafter B. feued from A. a plot of ground to the north of C.'s ground. In this latter contract between A. and B. there were no restrictions as to the class of buildings to be erected on the ground by the vassal. In a petition to the Dean of Guild by B., for warrant to erect tenements of dwelling-houses in flats and shops on the ground last acquired by him, it was held, on appeal, that B.'s title was not subject to any restriction in favour of C., whose action, if he had one, was for damages against the superior, owing to his failure to insert the restriction in B.'s title.<sup>4</sup> A power reserved to the superior to dispense with the restriction is inconsistent with such mutuality of

<sup>1</sup> *Hislop v. MacRitchie's Trs.*, 1881, 8 R. (H.L.) 95, at p. 101; see also *Maguire v. Burges*, 1909 S.C. 1283, per Lord President Duncedin, and *Botanic Gardens Picture House v. Adamson*, 1924 S.C. 549.

<sup>2</sup> 1886, 13 R. 623.

<sup>3</sup> 1888, 15 R. 477.

<sup>4</sup> Cf. *Blackwood v. Bell*, 1825, 4 S. 26; *Carson v. Miller*, 1863, 1 M. 604; *Johnston v. MacRitchie*, 1893, 20 R. 539; *Bannerman's Trs. v. Howard & Wyndham*, 1902, 39 S.L.R. 445; *Thomson v. Mackie*, 1903, 11 S.L.T. 562; *Murray's Trs. v. Trs. for St. Margaret's Convent*, 1906, 8 F. 1109; affd. 1907 S.C. (H.L.) 8.



rights between the feuars as to entitle one of them to found on the restriction.<sup>1</sup>

983. On the other hand, there are many cases in which a feuar's title has been sustained in an action by him against co-feuars to enforce the building restrictions. In the case of *Cockburn v. Heriot's Hospital*<sup>2</sup> action was allowed, since the conditions were evidently intended for the benefit of the feuars; but this doctrine has been subsequently curtailed, and such mutuality as that described in *Hislop's* case insisted on.<sup>3</sup> If a *jus quæsitum* arising from mutuality of rights and obligations between feuars is acquired, the superior cannot validly discharge any one feuar from the conditions and restrictions of the feu-contract without the consent of the rest.<sup>4</sup> Where, however, a feuar has no title to enforce a restriction, the objection to his title is not obviated by the consent and concurrence of the superior.<sup>5</sup>

#### SECTION 7.—INTEREST TO MAINTAIN ACTION.

984. The party enforcing such a condition, whether superior or vassal, must have a legitimate interest to maintain the action. But *primâ facie*, the vassal, in consenting "to be bound by the restriction, concedes the interest of the superior, and therefore the onus is upon the vassal who is pleading a release from his contract to allege and prove that, owing to some change of circumstances, any legitimate interest which the superior may originally have had in maintaining the restriction has ceased to exist."<sup>6</sup> What gives sufficient interest depends on the circumstances of each case. Direct patrimonial interest is not necessary.<sup>7</sup> "The law sustains it as a sufficient interest that a proprietor in a row of houses wishes them to be maintained so as to shew a uniform or symmetrical front or elevation; and if he has aptly and sufficiently stipulated for this in all the titles, it will be given him, though his only interest be an æsthetical one."<sup>8</sup> Where the superiors were the managers of a canal, they were held to be entitled to enforce a condition prohibiting public-houses, in respect that the existence of a public-house might be detrimental to the sobriety of their employees and the proper and orderly management of the canal.<sup>9</sup> It is not necessary for the superior to shew that the maintenance of the restriction will be beneficial to him. It is enough that it may be beneficial and is

<sup>1</sup> *Turner v. Hamilton*, 1890, 17 R. 494.

<sup>2</sup> 1825, 4 S. 128; 1826, 2 W. & S. 293.

<sup>3</sup> *Alexander v. Stobo*, 1871, 9 M. 599, at pp. 605, 609; *Ewing v. Hastie*, 1878, 5 R. 439; *Free St. Mark's Church v. Taylor's Trs.*, 1869, 7 M. 415; *Johnston v. The Walker Trs.*, 1897, 24 R. 1061; but see *Hill v. Millar*, 1900, 2 F. 799.

<sup>4</sup> *Dalrymple v. Herdman*, 1878, 5 R. 847.

<sup>5</sup> *Hislop*, *supra*.

<sup>6</sup> Per Lord Watson in *E. of Zeiland v. Hislop*, 1882, 9 R. (H.L.) 40, at p. 47.

<sup>7</sup> *Menzies v. Caledonian Canal Commissioners*, 1900, 2 F. 953; *Forrest v. George Watson's Hospital*, 1905, 8 F. 341, per Lord Dundas, Ordinary.

<sup>8</sup> Per Lord Gifford in *Stewart v. Bunten*, 1878, 5 R. 1108, at p. 1115; see also *Beattie v. Ure*, 1876, 3 R. 634; *Naismith v. Cairnduff*, 1876, 3 R. 863.

<sup>9</sup> *Menzies*, *supra*.



not obviously useless.<sup>1</sup> But the possibility that the feuar might be willing to buy release from the restrictions is not sufficient to give the superior an interest to enforce them.<sup>1</sup>

985. But while the feuar may be freed from a restriction by reason of the superior having lost his interest to enforce it, he is not entitled, standing the restriction, to plead that the superior has no interest to object to a particular deviation. If the superior is entitled to enforce the restriction at all, he is entitled to enforce it according to its terms.<sup>2</sup> Thus a superior was held entitled to interdict his vassal from roofing his buildings with slates of a different kind from those specified in the feu-contract, notwithstanding an averment by the vassal that the superior had no interest to object to the deviation, in respect the slates which were being used were of better quality than those mentioned in the feu-contract.<sup>3</sup> When the question arises between the original vassal and the superior the case is peculiar in this respect, that the vassal in pleading want of interest is attempting to obtain release not only from a real burden, but also from a personal contract to which he himself was a party. Apart from acquiescence on the part of the superior, it is doubtful whether the vassal is entitled to plead that the superior has no interest to enforce the contract.<sup>4</sup> In any view it is clear that the onus of proof is heavier in the case of the original vassal, than in the case of a singular successor,<sup>3</sup> and if there has been no change of circumstances since the date of the contract, the presumption in favour of the superior will be "all but insurmountable."<sup>1</sup>

986. Acquiescence in such circumstances as infer consent to the buildings complained of, or express a tacit abandonment of the restrictions, is fatal to the maintenance of an action for infringement.<sup>5</sup> But consent to the abandonment of certain building restrictions does not imply consent to the abandonment of all building restrictions which may be imposed on the feuar. The consent implied in acquiescence goes no further than the things acquiesced in or things *ejusdem generis*, and it is only when the acquiescence shews a virtual departure from the whole restriction that it receives such effect.<sup>6</sup> Where both the superior and co-feuar are entitled to enforce a restriction, the fact that the superior has acquiesced in an infringement does not bar the co-feuar from objecting.<sup>7</sup> The plea of bar in respect of acquiescence is more

<sup>1</sup> *Menzies, supra*, per Lord Kincairney.

<sup>2</sup> *Moyes v. M'Diarmid*, 1900, 2 F. 918, per Lord Kinneir, at p. 927; *Waddell v. Campbell*, 1898, 25 R. 456; *Calder v. Police Commissioners of North Berwick*, 1899, 1 F. 491; *Hill v. Millar*, 1900, 2 F. 799; cp. *Campbell v. Bremner*, 1897, 24 R. 1142.

<sup>3</sup> *Waddell, supra*.

<sup>4</sup> *Waddell, supra*; *Menzies, supra*.

<sup>5</sup> *M'Gibbon v. Rankin*, 1871, 9 M. 423; *Russell v. Cowpar*, 1882, 9 R. 660; *Browns v. Burns*, 1823, 2 S. 298; *Campbell v. Clydesdale Banking Co.*, 1868, 6 M. 943; *Fraser v. Downie*, 1877, 4 R. 942; *Ewing v. Campbell*, 1877, 5 R. 230; *Calder, supra*; *Robertson's Trs. v. Bruce*, 1905, 7 F. 580.

<sup>6</sup> *Johnston v. The Walker Trs.*, 1897, 24 R. 1061, per Lord Adam; *Mactaggart & Co. v. Roemmele*, 1907 S.C. 1318, per Lord McLaren; *Stewart v. Buntin*, 1878, 5 R. 1108; cp. *Campbell v. Bremner*, 1897, 24 R. 1142.

<sup>7</sup> *Mactaggart & Co. v. Roemmele*, 1907 S.C. 1318, per Lord President Dunedin.

easily pleaded against the superior than against a co-feuar.<sup>1</sup> The quality of the superior's interest is the same in respect of each feu. If he has allowed A. to contravene, that fact suggests that he has no interest to enforce the restriction as against B. On the other hand, the co-feuar may not be inconvenienced by a contravention on the part of A., in which case he would naturally refrain from interfering even if he had a legal interest to do so. But the co-feuar might be seriously prejudiced by a similar contravention on the part of B.<sup>2</sup>

987. The superior may also become disentitled to enforce a building restriction by failing to perform his own obligations under the feucharter or feu-contract.<sup>3</sup> The obligations undertaken by the superior are the counterpart of those undertaken by the feuar, and, as in the case of other personal contracts, the superior is not entitled to enforce the contract against the vassal unless he is willing to perform his own part.<sup>4</sup>

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<sup>1</sup> *Mactaggart & Co., supra* ; *Liddall v. Duncan*, 1898, 25 R. 1119, per Lord Moncreiff.

<sup>2</sup> *Mactaggart & Co., supra*, per the Lord President.

<sup>3</sup> *Stevenson v. Steel Co. of Scotland*, 1899, 1 F. (H.L.) 91 ; *Cheyne v. Taylor*, 1899, 7 S.L.T. 276.

<sup>4</sup> *Stevenson, supra*, per Lord Watson.

# BUILDING SOCIETIES.

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## SECTION 1.—INTRODUCTORY.

### SUBSECTION (1).—*Definition.*

**938.** A building society is a society established for the purpose of raising, by the subscriptions of the members, a stock or fund for the purpose of making advances to members out of the funds of the society upon the security of heritable estate. Such societies are associations of a special kind quite distinct from common law partnerships, and are regulated by statutes of 1836, 1874, 1875, 1877, 1884, and 1894 respectively.<sup>1</sup> The last five of these statutes are cited as the Building Societies Acts. The Forged Transfers Acts<sup>2</sup> also apply to building societies. The Act of 1836 only remains in force for societies certified under it before the year 1856, and not recertified under the Act of 1874. Otherwise it is repealed.<sup>3</sup>

Every building society under the Building Societies Act is deemed to be a company under the Companies (Consolidation) Act, and may be

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GENERAL AUTHORITIES.—Wurtzburg on Building Societies, 5th ed., 1920; Macoun on Building Societies; Davies, Law of Building and Land Societies; Fowke, Industrial and Provident Societies; The Laws of England (Halsbury), 1st ed., 1908, vol. iii.

<sup>1</sup> 6 & 7 Will. IV. c. 32 (1836); 37 & 38 Vict. c. 42 (1874); 38 & 39 Vict. c. 9 (1875); 40 & 41 Vict. c. 63 (1877); 47 & 48 Vict. c. 41 (1884); 57 & 58 Vict. c. 47 (1894).

<sup>2</sup> 54 & 55 Vict. c. 43, and 55 & 56 Vict. c. 36.

<sup>3</sup> 1874 Act, s. 7; 1894 Act, s. 25.

wound up under the provisions of that Act notwithstanding that it has been established and certified under the Building Societies Act, 1836.<sup>1</sup>

SUBSECTION (2).—*Classes of Building Societies.*

**989.** Building Societies may be either unincorporated or incorporated.

To the former class belong all those registered before 1874, and not re-registered under the Act of that year. All societies under the Act of 1874 are incorporated, having perpetual succession and a common seal.<sup>2</sup> Practically all societies are now incorporated except a few established before 1856.

**990.** Building Societies may be terminating or permanent. A terminating society is one which is to terminate at a fixed date, or when a result specified in its rules is attained. The point of termination is usually when there are sufficient funds to give each member a sum of money fixed by the rules when the society was formed. In a terminating society also a uniform subscription is paid by all the members until the society terminates. The funds are advanced to members on heritable security, and the shares may be purchased by members at a discount. Anyone joining such a society after its commencement must make a "back payment" to put him on the same footing as the other members. In a permanent society, on the other hand, there is no fixed period for its winding-up, and a member may join at any time, and that without any "back payment." Members take shares of a fixed amount payable either in a lump sum or in instalments. The sums paid upon shares usually carry interest. A rule by a building society authorising the directors to issue deposit or paid-up shares at a fixed rate of interest with a right of withdrawal in preference to ordinary unadvanced members is valid.<sup>3</sup>

Preference shareholders may under the terms of issue be entitled to have contributions made by the other members so that they may be repaid their shares in full.<sup>4</sup>

**991.** Advances are made on heritable security and are usually repayable by instalments of principal and interest calculated on a scale which will extinguish the loan at a fixed date. The instalment table is as a rule annexed and referred to in the bond or other document. Ballotting for priority of right to an advance is customary in some societies. This is forbidden as to societies established after 25th August 1894.<sup>5</sup>

SUBSECTION (3).—*Regulation by Registrar of Friendly Societies.*

**992.** Under the statutes, building societies are subject to stringent regulations. The Registrar of Friendly Societies and the assistant

<sup>1</sup> *Smith v. Irvine and Fullarton Property Investment and Building Society*, 1903, 6 F. 99.

<sup>2</sup> 1874 Act, s. 9.

<sup>3</sup> *In re Guardian Building Society*, 1882, 23 Ch. D. at 441; *Murray v. Scott*, 1884, 9 App. Ca. 519.

<sup>4</sup> *Reliance Building Society*, 1892, W.N. 77.

<sup>5</sup> 1894 Act, s. 12.



registrars have the superintendence of building societies. There is an assistant registrar appointed for Scotland. He must be an advocate, Writer to the Signet, or solicitor of not less than seven years' standing. The assistant registrars exercise, within the parts of the United Kingdom for which they are respectively appointed, all functions and powers given by the Act to the registrar, and may also, by the written authority of the chief registrar, exercise such of the functions and powers given to the chief registrar as he may delegate to them. Certain acts also can only be done by the registrar with the consent and concurrence of the Secretary of State, who so far as Scotland is concerned is the Secretary of State for Scotland.<sup>1</sup>

## SECTION 2.—INCORPORATED SOCIETIES.

### SUBSECTION (1).—*Regulation.*

**993.** These are societies which were either formed under the Building Societies Act, 1874, or, having been originally formed under the Act of 1836, obtained subsequently a certificate of incorporation under the Building Societies Act of 1874. They are governed by the Building Societies Acts of 1874 to 1894, and are subject to the Regulations framed in 1895 by the Secretary of State under the powers to that end given to him by s. 44 of the Act of 1874. These regulations, *mutatis mutandis*, apply to Scotland.

### SUBSECTION (2).—*Rules.*

**994.** The particulars which must appear in the rules of a building society established under the 1874 Act are set out in s. 16 of that Act. The following remarks are applicable to societies so established under the 1894 Act, and also to those societies established under the 1874 Act (*i.e.* those registered between the passing of the Act of 1874 and that of 1894) which desire to substitute a new set of rules for their existing rules.

**995.** The rules of the society must set forth the name of the society and the address of the chief office of the society; the manner in which its funds are to be raised;<sup>2</sup> the terms upon which unadvanced subscription shares are to be issued;<sup>3</sup> the manner in which the contributions are to be paid and withdrawn, with tables, where applicable in the opinion of the registrar, showing the amount due by the society for principal and interest separately;<sup>4</sup> the terms upon which paid-up shares, if any, are to be issued and withdrawn, with tables, where applicable in the opinion of the registrar, showing the amount due by the society for principal and interest separately;<sup>5</sup> whether preferential shares are to be issued, and if so within what limits;<sup>6</sup> the manner in which advances are to be made, not being by ballot or dependent on any chance or lot, and not being on second mortgage, and are to be repaid;<sup>7</sup>

<sup>1</sup> Secretary for Scotland Act, 1887, 50 & 51 Vict. c. 52, s. 2.

<sup>2</sup> 1894 Act, s. 1 (*a*).

<sup>3</sup> *Ibid.*, s. 1, subsec. (*d*).

<sup>4</sup> *Ibid.*, s. 1, subsec. (*b*).

<sup>5</sup> *Ibid.*, s. 1, subsec. (*c*).

<sup>6</sup> *Ibid.*, (*e*) and also s. 12, subs. (1) and s. 13.

<sup>7</sup> 1874 Act, s. 16.

the deductions, if any, for premiums, and the conditions upon which a borrower from the society can redeem the amount due from him before the expiration of the period for which the advance was made, with tables, where applicable in the opinion of the registrar, showing the amount due from the borrower after each stipulated payment; <sup>1</sup> the manner in which losses are to be ascertained and provided for; <sup>2</sup> the manner in which membership is to cease; <sup>3</sup> whether the society intends to borrow money, and, if so, within what limits not exceeding those prescribed by the statutes, <sup>4</sup> and not including advances on conveyance or bond and disposition in security twelve months in arrear, <sup>5</sup> or heritable subjects twelve months in possession; <sup>5</sup> how the funds of the society are to be applied and invested; <sup>6</sup> the manner of altering and rescinding the rules of the society, and of making additional rules; <sup>7</sup> the manner of appointing, remunerating and removing the officers of the society; <sup>8</sup> the manner of calling general and special meetings of the members; <sup>9</sup> provision for an annual or more frequent audit of the accounts, and inspection by the auditors of the conveyances, bonds and dispositions in security, and other securities belonging to the society; <sup>10</sup> whether disputes between the society and its members are to be settled by a reference to the Sheriff Court, or to the registrar, or to arbitration; <sup>11</sup> provision for the device, custody and use of the seal of the society, and for the custody of the security writs belonging to the society; <sup>12</sup> the powers and duties of the society's officers; <sup>13</sup> the fines and forfeitures to be imposed upon members; <sup>14</sup> and the manner in which the society, whether it is terminating or permanent, is to be terminated or dissolved. <sup>15</sup>

#### SUBSECTION (3).—*Cancellation and Suspension of Registry.*

**996.** Where the registrar is satisfied that a certificate of incorporation has been obtained for a building society by fraud or mistake, or that any society exists for an illegal purpose, or has wilfully and after notice from him violated any of the provisions of the Building Societies Acts, or has ceased to exist, he may, with the approval of the Secretary of State, cancel the registry of the society, or suspend its registry for any term not exceeding three months, and may, with the like approval, renew such suspension from time to time for the like period. <sup>16</sup> The registrar must, however, before so cancelling or suspending the registry of a society give the society not less than two months' previous notice in writing, specifying the ground of the proposed cancellation or suspension. As soon as practicable after cancellation or suspension takes place the registrar must cause notice thereof to be published in the *Gazette* and in some local newspaper (in Scotland notice in the *Edinburgh*

<sup>1</sup> 1894 Act, s. 1, subsec. (e).

<sup>2</sup> *Ibid.* (f).

<sup>3</sup> *Ibid.* (g).

<sup>4</sup> *Ibid.* (h).

<sup>5</sup> *Ibid.*, s. 14.

<sup>6</sup> 1874 Act, s. 16 (3) and s. 25, and 1894 Act, ss. 16 and 17.

<sup>7</sup> 1874 Act, s. 16 (5) and s. 18.

<sup>8</sup> *Ibid.*, s. 16 (6).

<sup>9</sup> *Ibid.*, s. 16 (7).

<sup>10</sup> *Ibid.*, s. 16 (8).

<sup>11</sup> *Ibid.*, s. 16 (9).

<sup>12</sup> *Ibid.*, s. 16 (10) and (11).

<sup>13</sup> *Ibid.*, s. 16 (12).

<sup>14</sup> *Ibid.*, s. 16 (13).

<sup>15</sup> *Ibid.*, s. 16 (14).

<sup>16</sup> 1894 Act, s. 6 (1).

*Gazette* and in either the *Scotsman* or *Glasgow Herald* or both, together with a local paper, would probably be held sufficient to conform to the statutory requisites).<sup>1</sup> The society has a right of appeal to the Court of Session from this cancellation, or from any suspension for any term exceeding six months.<sup>2</sup> The registrar may also, if he thinks fit, at the request of the society, cancel its registry.<sup>3</sup>

997. Any society, whose registry has been cancelled or suspended as above, ceases to enjoy the privileges of a society registered under the Building Societies Acts, but without prejudice to any liability actually incurred by the society, and any such liability may be enforced against the society as if the cancellation or suspension had not taken place.<sup>4</sup> It has been held in England that the Court has no power to declare a certificate of incorporation void upon the ground that it has been irregularly obtained.<sup>5</sup>

#### SUBSECTION (4).—*Proof of Incorporation and of Rules.*

998. Any certificate of incorporation or registration, or other document relating to a society and purporting to be signed by the registrar, will, in the absence of any evidence to the contrary, be received by all Courts and elsewhere without proof of the signature; and a printed copy of the registered rules, certified by the secretary or other officer to be a true copy, in the absence of evidence to the contrary, is received as evidence of the rules.<sup>6</sup> It has been decided in England that the certificate of the registrar, although not conclusive as to the legality of a rule,<sup>7</sup> is conclusive as to the regularity of the proceedings as a result of which the rule was passed.<sup>8</sup>

999. The rules for the time being in force in any society form the contract between the society and its members, and this contract can only be varied by an alteration of the rules duly registered, and in no other way; <sup>9</sup> thus an attempt to alter the contract by the resolution of a general meeting has been held to be ineffectual.<sup>10</sup>

#### SUBSECTION (5).—*Shares.*

1000. A building society, unlike a joint-stock company, has no fixed capital. Shares are issued from time to time, as persons are found willing to take them up, and are extinguished as and when the share-

<sup>1</sup> 1894 Act, s. 6 (2).

<sup>2</sup> *Ibid.*, s. 6 (3).

<sup>3</sup> *Ibid.*, s. 6 (4).

<sup>4</sup> *Ibid.*, s. 6. (5).

<sup>5</sup> *Glover v. Giles*, 1881, 18 Ch. D. 173.

<sup>6</sup> 1874 Act, s. 20.

<sup>7</sup> *Laing v. Reed*, 1869, 21 L.T. 773; L.R. 5 Ch. 4.

<sup>8</sup> *Dewhurst v. Clarkson*, 1854, 3 E. and B. 194.

<sup>9</sup> *Galashiels Provident Building Society v. Newlands*, 1893, 20 R. 821. In this case the rules provided that 10 per cent. interest was to be charged on interest in arrears. A member borrowed from the society, granting a heritable bond in security, which was silent on the question of arrears: It was held that a discharge of the heritable security did not relieve the member of his obligations under the rules as to arrears.

<sup>10</sup> *Auld v. Glasgow Working Men's Building Society*, 1887, 12 App. Ca. 197; 14 R. (H.L.) 27.



holder ceases to be a member by withdrawal or from any other cause provided for in the rules. The shares may either be paid up at once or by instalments, according to the rules, which may also provide for the issue of preferential shares.<sup>1</sup> In England an infant (*i.e.* a person, either male or female, in nonage, or under twenty-one) may be a member, in the absence of any rule to the contrary, and may give all necessary discharges or receipts, but cannot vote or hold office,<sup>2</sup> and it has also been decided in England that an infant member cannot execute a mortgage to a building society.<sup>3</sup> So far, there have been no cases in Scotland dealing with the position of a pupil or minor member of a building society. As the whole Act applies to Scotland with the exception of certain sections specifically excluded, and as this section is not in that category, it would seem that there is nothing to prevent a pupil or minor in Scotland becoming a member of a building society, but it is thought that if one did so he would be subject to the same disqualifications and disabilities as affect the membership of an infant in England, and in addition the provisions with reference to the tutory and curatory of such persons in the law of Scotland would require to be kept in view.

**1001.** The liability of a member of a building society in respect of any share on which no advance has been made is limited to the amount actually paid or in arrear on such share.<sup>4</sup>

#### SUBSECTION (6).—*Officers.*

**1002.** The affairs of a building society are usually entrusted to a board of directors or committee of management, whose powers and duties are defined in the rules of the society, with a secretary or manager.

**1003.** Every officer of the society having the receipt or charge of money must give a bond or other security for rendering a just and true account of all monies received and paid by him on account of the society, and for payment of all sums due from him to the society.<sup>5</sup> Every officer also must, upon demand, (*a*) give in his account as may be required by the directors or committee of management to be examined, and allowed, or disallowed by them; (*b*) pay over all the monies remaining in his hands; deliver all property of the society in his hands or custody to such person as the society may appoint; and, in case of his neglect or refusal to do so, the society may sue upon the bond, or may apply to the Sheriff Court, which may proceed thereupon in a summary way, and make such order as to the Court shall seem just, which order will be final and not subject to review.<sup>6</sup>

**1004.** The directors of a building society are not trustees for individual shareholders nor for creditors of the society. They are trustees of the

<sup>1</sup> 1894 Act, s. 1 (*c*) and (*d*).

<sup>2</sup> 1874 Act, s. 38.

<sup>3</sup> *Nottingham Permanent Building Society v. Thurstan*, [1903] A.C. 6.

<sup>4</sup> 1874 Act, s. 14; *Scottish Savings Bank, etc., Liq. v. Russell*, 1883, 10 R. (H.L.) 19.

<sup>5</sup> 1874 Act, s. 23.

<sup>6</sup> *Ibid.*, s. 24.



powers conferred on them and of the money and property of the society. It has been decided in England accordingly that they will be treated as such in respect to money of the society which has come into their hands or is actually under their control.<sup>1</sup>

SUBSECTION (7).—*Powers of Society.*

**1005.** A building society may hold land so far as necessary for its proper purposes. Any land or heritable property to which any building society has become absolutely entitled either by enforcing its security rights, or by surrender or other extinguishment of the member's right of redemption, must, as soon afterwards as may be conveniently practicable, be sold or converted into money.<sup>2</sup> It has been held in England that a society may not advance money by way of mortgage on any property other than land.<sup>3</sup> The point cannot arise in Scotland, as here there is no way of constituting a floating mortgage over moveables as there is in England.

**1006.** A building society may not cause or permit applicants for advances from the society to ballot for precedence, or in any way make the grant of an advance depend upon any chance or lot, unless the society was established prior to 25th August 1894, and its rules permit such balloting.

**1007.** Every building society enjoys the following statutory powers and privileges: It may purchase, take upon hire, build, or take upon lease any building for the purpose of therein conducting its business, and may adapt and furnish the same, and may purchase or hold upon lease any land for the purpose only of erecting thereon a building for conducting the business of the society, and may sell, excamb, or let such building or any part thereof; <sup>4</sup> it may change its chief office; <sup>5</sup> change its name; <sup>6</sup> alter its rules; <sup>7</sup> invest any portion of its funds not immediately required for its purposes in any of the securities authorised by s. 25 of the Act of 1874, or in any security for the time being authorised by law for the investment of trust funds,<sup>8</sup> and make deposits or investments through savings banks; <sup>9</sup> and when trustees, who hold stock in trust for a society are abroad, dead, or incapacitated, a transfer of the stock may be directed by the registrar.<sup>10</sup> Two societies may unite and become one society, or one society may transfer its engagements to another.<sup>11</sup>

SUBSECTION (8).—*Borrowing.*

**1008.** Previous to the Act of 1874 a society did not have power to borrow unless its articles specially authorised it to do so. That Act

<sup>1</sup> *Sheffield and South Yorkshire Building Society v. Aizlewood*, 1889, 44 Ch. D. 412.

<sup>2</sup> 1874 Act, s. 13.

<sup>3</sup> *Cullerne v. London and Suburban Building Society*, 1890, 25 Q.B.D. 485.

<sup>4</sup> 1874 Act, s. 37.

<sup>5</sup> 1877 Act, s. 2.

<sup>6</sup> 1874 Act, s. 22.

<sup>7</sup> *Ibid.*, s. 18.

<sup>8</sup> 1894 Act, s. 17.

<sup>9</sup> *Ibid.*, s. 16.

<sup>10</sup> 1874 Act, s. 26.

<sup>11</sup> *Ibid.*, s. 33.

conferred a limited power to borrow for the purposes of the society. A building society may now receive loans from any person or corporation, or from any terminating building society. In a permanent society the amount so received must not at any time exceed two-thirds of the amount for the time being secured to the society by mortgages from its members. In a terminating society the amount may be either a sum not exceeding such two-thirds, or a sum not exceeding twelve months' subscriptions on the shares for the time being in force.<sup>1</sup> Every deposit book, or acknowledgment, or security given for a deposit or loan must have written or printed upon it the whole of ss. 14 and 15 of the Act of 1874, but it is to be noted that it has been decided in England that this provision is directory only, and that failure to comply with it will not invalidate the security.<sup>2</sup>

**1009.** In calculating the extent of the society's borrowing powers, not only the principal sums due to it but also the interest due, as well as instalments not yet accrued due and the amount of any fines exigible under the rules, are to be taken into account.<sup>3</sup> On the other hand, the amount secured on properties the payments in respect of which were upwards of twelve months in arrear at the date of the society's last preceding annual account and statement, and the amount secured on properties of which the society had been twelve months in possession at the date of such account and statement, are to be disregarded. A society is forbidden to accept any deposit except on the terms that not less than one month's notice may be required by the society before repayment.<sup>4</sup> If a society receives deposits or loans in excess of the prescribed limits, the directors or committee of management will be personally liable for the excess.<sup>5</sup> Prescribed limits means limits prescribed by the rules of the society within the limits prescribed by the Act.<sup>6</sup> It is thought that where a society has obtained money by borrowing *ultra vires* the surplus of assets after repayment of proper creditors and returning to members what is due to them must go to those who made the advances.<sup>7</sup>

#### SUBSECTION (9).—Accounts.

**1010.** Once a year, at least, the society must make out a proper account and balance-sheet, which must be in the form and contain the particulars prescribed by the registrar. The account must be properly attested and the society's securities inspected by auditors, one of whom at least must be a person who publicly carries on the business of an accountant. One copy of the account must be sent to every member and creditor, another must be suspended in the office of the

<sup>1</sup> 1874 Act, s. 15.

<sup>2</sup> See *In re Guardian Building Society*, 1882, 23 Ch. D. 440.

<sup>3</sup> *Neath Building Society v. Luce*, 1888, 43 Ch. D. 158.

<sup>4</sup> 1894 Act, s. 15.

<sup>5</sup> *Ibid.*, s. 43; *Cross v. Fisher*, [1892] 1 Q.B. 467.

<sup>6</sup> *Looker v. Wrigby*, 1882, 9 Q.B.D. 397.

<sup>7</sup> *Birkbeck Permanent Building Society*, [1912] 2 Ch. 183; *In re Guardian Society*, *supra*.

society, and a third sent to the registrar within fourteen days of the general meeting at which it is presented.<sup>1</sup>

SUBSECTION (10).—*Special Audit of Books.*

**1011.** In addition to the ordinary audit of a society's books, provision is made for the conduct of extraordinary investigations into the affairs of a society. Thus on the application of ten members, each of whom has been a member of the society for not less than twelve months, the registrar may appoint an accountant or actuary to inspect and report upon the books of the society. The applicants must give security for the costs, and the expenses of the inspection will be defrayed by the applicants, or out of the funds of the society, or by the members or officers, or former members or officers, and that in such proportions as the registrar may direct. The person appointed will have power to make copies of or extracts from the books of the society, and the registrar will communicate the results of the inspection to the applicants and to the society.<sup>2</sup>

SUBSECTION (11).—*Special Investigations and Special Meetings.*

**1012.** On the application of one-tenth of the members, or of one hundred members in the case of a society consisting of more than one thousand members, the registrar, with the consent of the Secretary of State, may either (1) appoint an inspector to examine into and report upon the affairs of the society; or (2) call a special meeting of the society. The application must be supported by such evidence as the registrar may direct for the purpose of shewing that the applicants have good reason for requiring the inspection or the meeting, and that they are not actuated by malicious motives; and notice of the application must be given to the society. The applicants must also give security for the costs, and the expenses of the inspection or meeting will be defrayed by the applicants, or out of the funds of the society, or by the members or officers, or former members or officers, in such proportions as the registrar may direct.<sup>3</sup>

**1013.** The inspector may require the production of the books, accounts, securities, and documents of the society, and may examine on oath its officers, agents, members, and servants in relation to its business. The registrar may prescribe the time and place of the meeting, and the matters to be discussed and determined, and the meeting will have all the powers of a meeting called according to the rules of the society, and will also have power to appoint its own chairman.<sup>3</sup>

**1014.** Where evidence is furnished, by a statutory declaration, of not less than three members, of facts which, in the opinion of the registrar, call for investigation, or for recourse to the judgment of a meeting, the registrar may exercise the above powers without any

<sup>1</sup> 1874 Act, s. 40; 1894 Act, ss. 2, 3.

<sup>2</sup> 1894 Act, s. 4.

<sup>3</sup> *Ibid.*, s. 5.



application by members, but with the consent of the Secretary of State; but the registrar is bound, on receipt of such declaration, to send a copy thereof to the society, and the society will, within fourteen days, be entitled to give him an explanatory statement in writing by way of reply thereto.<sup>1</sup>

#### SUBSECTION (12).—*Withdrawal of Members.*

**1015.** It follows from the nature of a share in a building society that an investing member may at any time withdraw from the society on such terms as are prescribed by the rules, which generally require a certain length of notice to be given on withdrawal. Upon a member who has given notice of withdrawal being repaid his subscriptions, his connection with the society is at an end.<sup>2</sup> The withdrawal of a member extinguishes his share. A member who has given notice but has not yet been repaid, though he ceases to be liable for any further subscriptions,<sup>3</sup> and may be entitled to priority of payment out of the assets of the society,<sup>4</sup> remains a member in other respects. Thus, he will be bound by a rule referring disputes between the society and its members to arbitration,<sup>5</sup> his vote must be taken into account in ascertaining the statutory majority required to sign an instrument of dissolution,<sup>6</sup> and he will be bound by alterations of rules, though made subsequently to the expiration of his notice of withdrawal.<sup>7</sup> If, while the notice is running, the society is dissolved or ordered to be wound up,<sup>8</sup> or even if there is a stoppage of the society's business, or a recognition by those entitled to form a judgment that it must be stopped,<sup>9</sup> the notice becomes of no effect, and no priority can be acquired under it in the distribution of the assets of the society.

**1016.** Membership may be terminated also as a consequence of a shareholder's default. Where the amount of the fines due by a member in consequence of his failure to pay instalments of the price of his share equalled the amount already paid towards the price of the share, it was held that membership had been properly terminated.<sup>10</sup>

It has been held in a recent case that a writing under the hand of a member of a Friendly Society, intended to pass his interest therein, may not be authenticated by the member's mark duly witnessed.<sup>11</sup>

<sup>1</sup> 1894 Act, s. 5.

<sup>2</sup> *In re Sheffield and South Yorkshire Building Society*, 1889, 22 Q.B.D. 472.

<sup>3</sup> *Sibun v. Pearce*, 1890, 44 Ch. D. 372.

<sup>4</sup> *Walton v. Edge*, 1884, 10 App. Ca. 33.

<sup>5</sup> *Walker v. General Mutual Building Society*, 1887, 36 Ch. D. 777.

<sup>6</sup> See *Sibun v. Pearce*, *supra*.

<sup>7</sup> *Pepe v. City and Suburban Building Society*, [1893] 2 Ch. 311; see also *Barnard v. Tomson*, [1894] 1 Ch. 374.

<sup>8</sup> *Selkirk v. Taylor*, 1887, 24 S.L.R. 600; sub nom. *North British Building Society v. M'Lellan*, 1887, 14 R. 827.

<sup>9</sup> *In re Ambition Investment Society*, [1896] 1 Ch. 89; *In re Sunderland Building Society*, 1890, 24 Q.B.D. 394.

<sup>10</sup> *Liqr. of Irvine and Fullarton Property Investment and Building Society v. Cuthbertson*, 1905, 8 F. l.

<sup>11</sup> *Morton v. French*, 1908 S.C. 171.



SUBSECTION (13).—*Payments to Representatives.*

**1017.** On the death intestate of a member or depositor, the amount due to him, not exceeding fifty pounds, may be paid to the person who appears to the directors to be entitled thereto, without the necessity for the payee taking out confirmation. The payment may be made on the production of satisfactory evidence of the death, and a statutory declaration that the deceased died intestate, and that the claimant is entitled. Payments so made are valid as between the society and the next of kin or representatives of the deceased, but leave untouched the right of recourse of the latter against the payee.<sup>1</sup> On the death intestate of an advanced member leaving an heir below the age of twenty-one, the society, after selling the security subjects, may pay the surplus proceeds of sale, not exceeding one hundred and fifty pounds, to the executor or other administrator of the deceased, and such sum will be considered personal estate and liable to duty accordingly.<sup>2</sup>

SUBSECTION (14).—*Rights and Liabilities of Advanced Members.*

**1018.** An advanced member is one who has had an advance made to him by the society in respect of his house. In return for the advance the member may have pledged his share to the society, in which case the society holds the value of the share as it matures, and also a heritable security over the house, which forms the subject-matter of the loan or advance.<sup>3</sup> Speaking generally, the ordinary law affecting heritable securities applies in the case of a security given to a building society by any of its members,<sup>4</sup> and, accordingly, the society has the right of foreclosure,<sup>5</sup> and the advanced member the right of redemption upon such terms as may be prescribed by the rules. As to redemption in a terminating society, see the cases undernoted.<sup>6</sup> As to the amount the society is entitled to retain on a sale of the security subjects, consult the two cases cited below.<sup>7</sup> An advanced member will be bound by any alteration of the rules, although made subsequently to the date of his advance.<sup>8</sup>

**1019.** In taking the accounts in any proceedings for sale of the security subjects on a foreclosure, or in any proceedings for redemption thereof, fines will be treated as principal, and will carry interest accordingly if there should be an agreement to that effect.<sup>5</sup> Advanced members are

<sup>1</sup> 1874 Act, s. 29.<sup>2</sup> *Ibid.*, s. 30.<sup>3</sup> *Rosenberg v. Northumberland Building Society*, 1889, 22 Q.B.D. 380.<sup>4</sup> *Provident Building Society v. Greenhill*, 1878, 9 Ch. D. 122.<sup>5</sup> *Provident Building Society v. Greenhill*, *supra*, and 1874 Act, s. 13.<sup>6</sup> *Seagrave v. Pope*, 1852, 1 De G. M. & G. 783; *Fleming v. Self*, 1849, 1 H. & T. 301;<sup>7</sup> *De G. M. & G.* 1032, *n.*<sup>8</sup> *Matterson v. Elderfield*, 1869, L.R. 4 Ch. 207; *Ex parte Osborne in re Goldsmith*, 1874, L.R. 10 Ch. 41.<sup>9</sup> *Rosenberg v. Northumberland Building Society*, *supra*; *Bradbury v. Wild*, [1893] 1 Ch. 377.

entitled to deduct income tax from so much of their repayments as represents interest;<sup>1</sup> but the premium commonly charged for an advance is not in the nature of interest, although it may be payable by instalments.<sup>2</sup>

**1020.** On payment of all monies secured by the conveyance or bond and disposition in security, the society may endorse upon or annex to the security writ either a reconveyance or a receipt, in a prescribed form under the seal of the society, countersigned by the secretary or manager.<sup>3</sup> It has been decided in England that such a receipt will vacate the security and vest the legal estate in the person who has the best right to call for a conveyance of it,<sup>4</sup> and it has also been held there that such a receipt will effectually prevent the society from afterwards asserting that anything remains due on such security, even although such a receipt should have been given under a mistake.<sup>5</sup>

#### SUBSECTION (15).—*Disputes.*

**1021.** Disputes between a building society and its members may be settled by reference (1) to arbitration, (2) to the registrar, or (3) to the Sheriff Court of the county in which the chief office or place of meeting for the business of the society is situated. The rules of the society must state which mode is to be followed. The term "disputes" is, however, confined to disputes between the society and a member or any representative of a member in his capacity of a member of the society, unless otherwise expressly provided by the rules; and, in the absence of such express provision, will not apply to a dispute as to the construction or effect of any security writ or any contract contained in any document other than the rules of the society.<sup>6</sup> Consequently, any dispute with an advanced member must be settled by recourse to the ordinary tribunals.

**1022.** Where the rules direct disputes to be referred to arbitration, arbitrators must be elected in manner provided by the rules, or, if there is no such provision, at the first general meeting of the society. No one may be chosen as an arbitrator who is beneficially interested in the society's funds; and not less than three out of the arbitrators so elected are to be chosen by ballot in each case of dispute, the number and mode of ballot being determined by the rules.<sup>7</sup> The award should

<sup>1</sup> *Ex parte Wythes*, 1885, 53 L.T. 492; *Galashiels Provident Building Society v. Newlands*, 1893, 20 R. 821; W.N. (1896), 107.

<sup>2</sup> *Ex parte Bath in re Phillips*, 1884, 27 Ch. D. 509.

<sup>3</sup> 1874 Act, s. 42.

<sup>4</sup> *Fourth City Mutual Society v. Williams*, 1879, 14 Ch. D. 140; *Hosking v. Smith*, 1888, 13 App. Ca. 582.

<sup>5</sup> *Harvey v. Municipal Permanent Investment Building Society*, 1884, 26 Ch. D. 273; *London and County United Building Society v. Angell*, 1896, 65 L.J. Q.B. 194.

<sup>6</sup> Building Societies Act, 1884, s. 2; *Western Suburban and Notting Hill Permanent Benefit Building Society v. Martin*, 1886, 17 Q.B.D. 66, 609.

<sup>7</sup> 1874 Act, s. 34; *Norton v. Counties Conservative Permanent Benefit Building Society*, 1894, 71 L.T. 790.

limit a time within which it is to be performed, and may be enforced by the Sheriff Court as above defined.<sup>1</sup>

**1023.** The registrar determines disputes—

(1) Whenever the rules direct these to be referred to him.

(2) Whenever the parties to a dispute agree to refer it to him: <sup>1</sup> and his award has the same effect as that of arbitrators.

**1024.** The Sheriff Court determines disputes—

(1) Whenever the rules direct them to be referred either to the Court or to justices.

(2) Whenever either party to the dispute has, for forty days after application, neglected to go to arbitration, or the arbitrators have refused, or for twenty-one days neglected, to make any award.<sup>2</sup>

**1025.** The determination of a dispute, whether by arbitrators, the registrar, or the Sheriff Court, is final, and is not subject to appeal;<sup>3</sup> but the arbitrators, the registrar, or the sheriff may, at the request of either party, state a case for the opinion of the Court of Session on any question of law.<sup>4</sup>

#### SUBSECTION (16).—*Termination of Society.*

**1026.** A building society may terminate on the happening of any event declared by its rules to be the termination of the society.<sup>5</sup> Accordingly, it may be dissolved—

(1) In manner prescribed by the rules.<sup>6</sup>

(2) With the consent of three-fourths of the members, holding not less than two-thirds of the shares, testified by their signatures to an instrument of dissolution, which must be duly registered.<sup>7</sup> Such an instrument cannot cancel priorities previously acquired by notices of withdrawal.<sup>8</sup>

**1027.** When a society is being dissolved in either of the above modes, the provisions of the Building Societies Acts continue to apply in the case of the society as if the persons conducting the dissolution or the trustees under the instrument of dissolution were the directors or committee of management of the society,<sup>9</sup> and such persons or trustees must within twenty-eight days from the termination of the dissolution send to the registrar an account and balance-sheet showing the assets and liabilities of the society, and the manner in which they have been applied and discharged.<sup>10</sup>

<sup>1</sup> 1874 Act, s. 34.

<sup>2</sup> *Ibid.*, s. 35.

<sup>3</sup> *Ibid.*, s. 36.

<sup>4</sup> 1894 Act, s. 20.

<sup>5</sup> 1874 Act, s. 32, subsec. (1).

<sup>6</sup> *Ibid.*, s. 32, subsec. (2).

<sup>7</sup> *Ibid.*, subsec. (3), and see also *Dennison v. Jeffs*, [1896] 1 Ch. 611; *Sibun v. Pearce*, 1890, 44 Ch. D. 354; and also *Second Edinburgh and Leith 493rd Starr-Bowkett Society v. Aitken*, 1892, 19 R. 603. In this last case it was held that the consent of members of a building society to its dissolution must be certified on the instrument of dissolution by their signatures, *written by themselves*.

<sup>8</sup> *Botten v. City and Suburban Permanent Building Society*, [1895] 2 Ch. 441.

<sup>9</sup> 1894 Act, s. 9.

<sup>10</sup> *Ibid.*, s. 11.



**1028.** A society may also be dissolved—

(3) By award of the registrar, on the written application of one-tenth of the members, or of one hundred members in the case of a society of more than one thousand members, setting forth that the society is unable to meet the claims of its members, and that it would be for their benefit that it should be dissolved.<sup>1</sup>

**1029.** A society may be terminated—

(4) By winding-up, either voluntarily under the supervision of the Sheriff Court, or by the Court, if the Court shall so order, on the petition of any member authorised, by three-fourths of the members present at a general meeting specially called for the purpose, to present the same on behalf of the society, or on the petition of any judgment creditor for not less than fifty pounds, but not otherwise.<sup>2</sup> It has been held in England that the winding-up provisions of the Companies Acts, 1862 and 1867,<sup>3</sup> apply in every case. There the *forum* depends upon the amount of the society's assets. If the amount standing to the credit of the holders of unadvanced shares exceeds ten thousand pounds the petition must be presented to the High (or Palatine) Court. On the other hand, if such amount does not exceed the sum mentioned, and the chief office of the society is situated within the jurisdiction of a County Court having jurisdiction under the Winding-up Act, 1890, the petition must be presented to that County Court.<sup>4</sup> In Scotland a winding-up under the Building Societies Act, 1874, is regulated by the procedure set forth in an Act of Sederunt of the Court of Session which is now incorporated in the Codifying Act of Sederunt, 1913.<sup>5</sup>

**1030.** This Act of Sederunt specifies the form of application to be used in the case of a winding-up; directs that the petition is to be printed; makes rules as to the procedure following upon the petition and in the winding-up, as to the appointment of a liquidator, and as to his tenure of office and remuneration. It also deals with the granting by the Court of special powers to carry on business during the progress of the liquidation, the making up of titles, etc. As the Act of Sederunt provides, "*All applications presented to the Court for the winding-up of a society registered under the Building Societies Act, 1874 . . . shall be by petition in form as nearly as may be of Initial Writs under the Act 7 Edw. VII. c. 51*" (*i.e.* the Sheriff Courts Act, 1907), it would appear that in Scotland the proper *forum* in every case, regardless of the amount of the assets as at the date of the commencement of the winding-up proceedings of the particular society, is the Sheriff Court of the County within which the society has its chief office or place of meeting for the business of the society.

<sup>1</sup> 1894 Act, s. 7.

<sup>2</sup> 1874 Act, s. 32 (4).

<sup>3</sup> Repealed and re-enacted Companies (Consolidation) Act, 1908; see also *Jones v. Swansea Cambrian Society*, 1880, 29 W.R. 382.

<sup>4</sup> 1894 Act, s. 8; Companies Winding-up Act, 1890, s. 1 (1), (2), (3), (5), (6); Ord. of 29th Nov. 1890; W.N. 1890, 577; *In re The Court Bureau* (No. 2), [1891] W.N. 15; *In re Real Estate Co.*, [1893] 1 Ch. 398.

<sup>5</sup> C.A.S., L. vii.



SUBSECTION (17).—*Liabilities of Members in a Winding-up.*

**1031.** Advanced members cannot, in a dissolution or winding-up, be required to pay up the amounts remaining owing by them except at the times and in the manner expressed in their securities.<sup>1</sup> They may redeem without regard to any losses which the society has sustained,<sup>2</sup> unless in the case where there is a special contract making them liable to share losses.<sup>3</sup> Investing members are only liable to contribute to the assets to the extent, if any, to which their subscriptions are in arrear at the commencement of the dissolution or winding-up.<sup>4</sup> It appears that, where there are no outside creditors, or where these have been satisfied from the assets of the society, members are not liable to answer calls made in respect of shares as they are not bound to contribute to the equalisation of the rights of contributories *inter se*. Members who have given notices to withdraw which expired while the society was still a going concern, or whose shares are realised, will not be deprived by the winding-up of any priority to which they may be entitled under the rules of the society,<sup>5</sup> provided, of course, that they do not compete with outside creditors. Any surplus assets remaining after payment of debts and making provision for priorities of withdrawn and realised shares will be divided among the members according to their rights at the commencement of the winding-up.<sup>6</sup>

**1032.** The rules of a building society provided (1) that when the profits with the instalments paid amounted to twenty-five pounds per share, members should be paid out; (2) that members who had not received an advance of money from the society might, after a year from their entry, withdraw by giving one month's previous notice, when the whole instalments should be repaid with the proportion of the profits effeiring thereto. The society stopped business and suspended payment on 24th December 1883, and was thereafter ordered to be wound up by the Court. A surplus remained for division among the members. It was held that a member whose shares, with the addition of interest at the rate fixed by the directors for the year, had matured before 24th December 1883, and a member who had given notice of withdrawal more than a month prior to the same date, and neither of whom had received payment before the stoppage, were entitled to a preference over the other contributors for the amount standing at the credit of their shares.<sup>7</sup>

**1033.** In the case of the winding-up of a building society, where a

<sup>1</sup> 1894 Act, s. 10.

<sup>2</sup> *Scottish Savings Bank, etc., Ligr. v. Russell*, 1883, 8 App. Ca. 235, and 10 R. (H.L.) 19; *Tosh v. North British Building Society*, 1886, 11 App. Ca. 490.

<sup>3</sup> *In re West Riding Building Society*, 1890, 43 Ch. D. 407.

<sup>4</sup> 1874 Act, s. 14; see also *Brownlie v. Russell*, *supra*.

<sup>5</sup> *Walton v. Edge*, 1884, 10 App. Ca. 33; *Ex parte Rackham*, 1876, 45 L.J. Ch. 785.

<sup>6</sup> *In re Middlesbrough Building Society*, 1889, 58 L.J. Ch. 771.

<sup>7</sup> *Liquidator of Greenock Property Investment Company v. Broadfoot's Trs. and Lyle*, 1890, 27 S.L.R. 859.

contributory failed to pay instalments as they became due, and where the society in question had a rule that failure by a member to pay instalments should result in his ceasing to be a member, it was held that such a rule works automatically, and is not an option in favour of the society to be exercised like company clauses of forfeiture of shares.<sup>1</sup>

#### SUBSECTION (18).—*Offences.*

**1034.** The following constitute statutory offences in the case of any building society:—

1. Commencing business without first obtaining a certificate of incorporation.<sup>2</sup>
2. Making default in inserting in any deposit book or security for loan the matters required by s. 15 of the Act of 1874.<sup>2</sup>
3. Accepting any deposit except upon the terms specified in and allowed by the Act of 1894.<sup>3</sup>
4. Using any name or title other than the registered name of the society.<sup>3</sup>
5. Neglecting or refusing (a) to give any notice, or any return or document, or do or allow to be done anything which the society is, by the Building Societies Acts, required to give, send, do, or allow to be done; or (b) to do any act or furnish any information required for the purposes of those Acts by the registrar or an inspector.<sup>4</sup>

Where a society has, for two months after notice, failed to make any return, or to correct or complete any return, the registrar may, with the consent of the Secretary of State, call a special meeting of the society, or appoint an inspector to examine into its affairs.<sup>5</sup>

**1035.** If any person, by false representation or imposition (a) obtains possession of any moneys or effects of the society, or (b), having the same in his possession, withholds or misapplies the same, he renders himself liable to a penalty not exceeding twenty pounds and costs, and to be ordered to deliver up to the society such moneys or effects, and also to repay in full the money improperly applied, and in default to be imprisoned for any period not exceeding three months; but nothing contained in this provision will prevent any such person from being proceeded against by way of indictment if a conviction has not been previously obtained against him for the same offence under the provisions of this Act.<sup>6</sup> In England proceedings under the above last-mentioned provisions may be taken by (a) the society; or (b) any member authorised by the society, or by the directors or committee of management, or by the registrar; or (c) the registrar.<sup>7</sup> In Scotland they

<sup>1</sup> *Irvine and Fullarton Property Investment and Building Society v. Cuthbertson*, 1905, 8 F. 1.

<sup>2</sup> 1874 Act s. 43.

<sup>3</sup> 1894 Act, s. 15.

<sup>4</sup> *Ibid.*, s. 21.

<sup>5</sup> *Ibid.*, s. 5 subs. (1) (a) and (b).

<sup>6</sup> 1874 Act, s. 31; *Vernon v. Watson*, [1891] 2 Q.B. 288.

<sup>7</sup> 1894 Act, s. 18.

would require to be taken by the Procurator-Fiscal for the area within which the offence had been committed on a complaint made to him by one or other of the parties above mentioned.

**1036.** No director, secretary, surveyor, solicitor, or other officer of any building society registered under the Building Societies Acts, may receive from any other person any gift, bonus, commission, or benefit for or in connection with any loan made by the society; and any person paying or accepting any such gift, etc., will be liable on summary conviction to a fine not exceeding fifty pounds, and, in default of payment, to be imprisoned for any period not exceeding six months; and the person accepting any such gift, etc., must, as and when directed by the Court by whom he is convicted, pay to the society the amount or value of such gift, etc., and in default may be sentenced to be imprisoned for any period not exceeding six months.<sup>1</sup>

**1037.** If any person wilfully makes, orders, or allows to be made any false statement in any document required by the Building Societies Acts to be sent to the registrar, or wilfully falsifies any such document, he will be liable on summary conviction to a fine not exceeding fifty pounds.<sup>2</sup>

**1038.** Upon the hearing of any charge involving fine or imprisonment on summary conviction under the Building Societies Act, 1894, the respondent and his wife are admissible as competent witnesses.<sup>3</sup>

**1039.** All officers of the society are liable to be examined on oath touching the affairs of the society by any inspector appointed by the registrar,<sup>4</sup> and the officials who are in fault will be personally liable for any statutory offence committed by the society. In this connection it may be here noted that, although in England it is a statutory offence under the Act of 1894 to lend the money of any building society on second mortgage (except when the society itself is the first mortgagee),<sup>5</sup> and accordingly directors or other officers authorising such an advance in connection with any English society render themselves personally liable, this does not apply to such societies in Scotland as were at the date of the passing of the Act (25th August 1894) authorised by their rules to make advances upon second bond.<sup>6</sup>

#### SUBSECTION (19).—*Stamp Duties.*

**1040.** The rules and all documents and instruments issued, given, or made by a building society under its rules or under the Building Societies Acts are exempt from stamp duty, but this exemption does not extend to conveyances or bonds and dispositions in security, by which the securities in favour of the society are constituted. These must accordingly be stamped in the ordinary way.<sup>7</sup>

<sup>1</sup> 1894 Act, s. 23.

<sup>2</sup> *Ibid.*, s. 22.

<sup>3</sup> *Ibid.*, s. 24.

<sup>4</sup> *Ibid.*, s. 5 (3).

<sup>5</sup> *Ibid.*, s. 13 (1).

<sup>6</sup> *Ibid.*, s. 13 (2).

<sup>7</sup> 1874 Act, s. 41.



## SECTION 3.—UNINCORPORATED SOCIETIES.

SUBSECTION (1).—*In General.*

**1041.** Unincorporated building societies are governed by the Building Societies Act of 1836,<sup>1</sup> and the two old Friendly Societies Acts of 1829<sup>2</sup> and 1834<sup>3</sup> incorporated therewith, which, although repealed for all other purposes, are still in force so far as relates to building societies certified prior to the year 1856, and not incorporated under the Building Societies Act of 1874.<sup>4</sup> Unincorporated societies with a few exceptions are even in England an unimportant class, and no new society can now be established on this footing. In Scotland there is now only one unincorporated building society.<sup>5</sup>

Subject to the following statutory provisions and requirements, what has been said above as to incorporated societies applies equally to unincorporated societies.

SUBSECTION (2).—*Constitution and Powers.*

**1042.** The purposes of the society are those defined by s. 1 of the Act of 1836; the shares must not exceed one hundred and fifty pounds in value, and no profits are payable until the share is realised or withdrawn.<sup>6</sup> The property of the society vests in its trustees for the time being, without conveyance or assignment, except in the case of public stocks and funds, and the society sues and is sued in the name of the trustees.<sup>7</sup> The society can alter its rules,<sup>8</sup> alter its place of meeting,<sup>9</sup> and invest its surplus funds in certain specified securities, or in the purchase of land.<sup>10</sup> It is under the same obligation to make an annual statement of accounts, and the society, its officers and members, are liable to the same penalties for default in so doing as in the case of an incorporated society.<sup>11</sup> All instruments and documents issued or made by the society in the course of its business are exempt from stamp duty,<sup>12</sup> but in the case of bonds and dispositions in security and conveyances with back letter, this exemption is limited to mortgages by members for sums not exceeding five hundred pounds.<sup>13</sup>

**1043.** The society may borrow money if and so far as authorised, either expressly or by necessary implication, by its rules,<sup>14</sup> and if money has been borrowed in excess of the society's powers, the lender may in some cases recover the amount lent—at least in England—under the equitable doctrine of subrogation,<sup>15</sup> or from the

<sup>1</sup> 6 & 7 Will. IV. c. 32.<sup>2</sup> 10 Geo. IV. c. 56.<sup>3</sup> 4 & 5 Will. IV. c. 40.<sup>4</sup> 1874 Act, s. 7 (part of which section is itself repealed); 1894 Act, s. 25 (2).<sup>5</sup> The Stirlingshire Building and Investment Society, Thistle Street, Stirling.<sup>6</sup> 6 & 7 Will. IV. c. 32, s. 1. <sup>7</sup> 10 Geo. IV. c. 56, s. 21.<sup>8</sup> *Ibid.*, ss. 5, 9; 4 & 5 Will. IV. c. 40, s. 4. <sup>9</sup> 10 Geo. IV. c. 56, s. 10. <sup>10</sup> *Ibid.*, s. 13.<sup>11</sup> 1874 Act, s. 40; 1894 Act, s. 25 (1). <sup>12</sup> 10 Geo. IV. c. 56, s. 37; 6 & 7 Will. IV. c. 32, s. 8.<sup>13</sup> Stamp Act, 1891, s. 89.<sup>14</sup> *Murray v. Scott*, 1884, 9 App. Ca. 519.<sup>15</sup> *Blackburn Benefit Building Society v. Cunliffe Brooks & Co.*, 1882, 29 Ch. D. 61; 1884, 9 App. Ca. 57; *Baroness Wenlock v. River Dee Co.* 1887, 19 Q.B.D. 155.



directors personally (also in England) upon the ground of breach of warranty.<sup>1</sup>

**1044.** With reference to the Benefit Building Societies Act, 1836, it has been held that an unregistered building society, formed under the above Act, had by its rules no power to assign any of the property of the society in security of a loan made to the society.<sup>2</sup>

#### SUBSECTION (3).—*Officers.*

**1045.** The officers of the society are bound by its rules, of which they are deemed to have full notice,<sup>3</sup> and any who have to receive or expend moneys of the society are bound, if the rules so require, to give a bond with two sureties as security for the due and proper discharge of their duties.<sup>4</sup> Provision is also made for compelling officers to account,<sup>5</sup> and for the punishment of fraud on the part of officers, members and others in relation to the affairs of the society,<sup>6</sup> and in certain cases the society is entitled to priority in payment out of the assets of its officers.<sup>7</sup>

#### SUBSECTION (4).—*Members' Rights and Liabilities.*

**1046.** Fines may be imposed upon the members, but the amount of the fine must be "reasonable."<sup>8</sup> Whether an infant, or in Scotland a minor, can be a member of such a society seems doubtful. Upon the death of a member, payment to the person apparently entitled will be valid,<sup>9</sup> and payment of a sum not exceeding twenty pounds may be made to such person without confirmation on the death of a member intestate.<sup>10</sup> Every member is entitled to receive from the society a copy of its annual account and statement;<sup>11</sup> and on repayment of an advance, the society reconveys by endorsed receipt.<sup>12</sup>

#### SUBSECTION (5).—*Disputes.*

**1047.** As to disputes, the rules must state whether they are to be referred to arbitrators or to the Justices of the Peace for the county where the society was formed.<sup>13</sup> In the former case arbitrators must be appointed in the manner directed by the Act;<sup>13</sup> and their award will be final and may be enforced by two justices,<sup>13</sup> who may also determine a dispute if the society refuses to arbitrate or the arbitrators refuse to

<sup>1</sup> *Richardson v. Williamson*, 1871, L.R. 6 Q.B.D. 276; *Chapleo v. Brunswick Building Society*, 1881, 6 Q.B.D. 696.

<sup>2</sup> *Irvine and Fullarton Property Investment and Building Society v. Wilson*, 1904 (O.H.), 12 S.L.T. 371.

<sup>3</sup> 10 Geo. IV. c. 56, s. 8.

<sup>4</sup> *Ibid.*, s. 11.

<sup>5</sup> *Ibid.*, s. 13.

<sup>6</sup> *Ibid.*, s. 25.

<sup>7</sup> 4 & 5 Will. IV. c. 40, s. 12; *In re Williams, Jones v. Williams*, 1887, 36 Ch. D. 573; *Moors v. Murriott*, 1878, 7 Ch. D. 543; *In re Miller*, [1893] 1 Q.B. 327; *In re Welch*, 1894, 70 L.T. 691.

<sup>8</sup> 6 & 7 Will. IV. c. 32, s. 1; *Lovejoy v. Mulkern*, 1877, 37 L.T. 77.

<sup>9</sup> 10 Geo. IV. c. 56, s. 23.

<sup>10</sup> *Ibid.*, s. 27.

<sup>11</sup> 1894 Act, s. 25; 1874 Act, s. 40.

<sup>12</sup> 6 & 7 Will. IV. c. 32, s. 5; see also *Hosking v. Smith*, 1888, and other cases cited, *supra*, p. 423.

<sup>13</sup> 10 Geo. IV. c. 56, s. 27.

make an award.<sup>1</sup> If the rules direct a reference to justices, any two of them may determine the matter,<sup>2</sup> and their decision will be final.<sup>3</sup> A dispute between the society and an advanced member is not within the above provisions, and, it has been held in England, must be settled by action in the usual way.<sup>4</sup>

#### SUBSECTION (6).—*Termination.*

**1048.** The society may come to an end in two ways: (1) It may be dissolved in manner prescribed by its rules, or (2) it may be wound up compulsorily under the Companies (Consolidation) Act, 1908, as an unregistered company,<sup>5</sup> but no valid winding-up order can be made if the number of members is below seven.<sup>6</sup> The Court to which the petition for winding up should be presented depends in England on the amount paid up on the unadvanced shares, and the general principles formerly stated will apply, except that advanced members can be compelled to pay up their balances at once,<sup>7</sup> and that there is no statutory limit to the liability of the members. As to the extent of their liability, see the case cited below.<sup>8</sup> In Scotland the matter of the *forum* to which such societies may apply to be wound up has not yet been the subject of judicial decision. If the society's rules state the *forum*, it is thought that that *forum* might have jurisdiction, but if the rules should be silent on the point, then such a society could only be wound up as an unregistered company by the Court of Session.<sup>9</sup>

<sup>1</sup> 4 & 5 Will. IV. c. 40, s. 7.

<sup>2</sup> 10 Geo. IV. c. 56, s. 28.

<sup>3</sup> *Ibid.*, s. 29.

<sup>4</sup> *Mulkern v. Lord*, 1879, 4 App. Ca. 182.

<sup>5</sup> *In re No. 3 Midland Counties Benefit Building Society*, 1864, 4 De G. J. & S., 468; Companies (Consolidation) Act, 1908, ss. 267–273.

<sup>6</sup> *In re Bowling & Welby's Contract*, [1895] 1 Ch. 663.

<sup>7</sup> *Tosh v. North British Building Society*, 1886, 11 App. Ca. 489.

<sup>8</sup> *In re West London and General Permanent Benefit Building Society*, [1894] 2 Ch. 352.

<sup>9</sup> See Companies (Consolidation) Act, 1908, ss. 135, 136, 137 (1), 214–223, 225–228, 238 (1) (h), 267, 268.

## BULL.

See CRIME.

## BULLION.

See MONEY AND MONEYLENDER.

# BURDENS.

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## SECTION 1.—DEFINITION.

1049. The term “burden,” in its widest sense, is applied to any incumbrance, restriction, or limitation affecting heritable property, or to any obligation incumbent on a person or corporation as the owner of property, heritable or moveable. The more important burdens are those which affect heritable property. The following sections deal at length with the incumbrance on heritable property known as the “real money burden,” but leave out of view limitations which are imposed by the law of neighbourhood, such as public nuisance, servitudes which depend for their effect on notoriety, and those building restrictions, including conventional nuisance, known as real conditions. An enumeration is, however, given, for the sake of convenience, of those burdens and limitations, such as servitudes, nuisance, terce, courtesy, liferents, and others, arising or imposed either *ex lege* or *ex contractu*, which will be found more fully and appropriately dealt with under other heads in the present work.

## SECTION 2.—CREATION OF BURDEN.

### SUBSECTION (1).—*Method of Creation.*

1050. Real money burdens may be created (1) by *reservation*, either in the original grant or in a deed of transmission of lands—the case of most frequent occurrence being that where the seller allows a portion of the price to remain on the security of the property as a debt due to him by the purchaser; (2) by *constitution*. This most frequently takes place where a testator conveys lands to one person under the burden imposed on the lands of the payment of provisions, legacies, or annuities

to others, or where testamentary or other trustees convey lands, either by arrangement or under directions by the testator, to a beneficiary under such burdens in favour of other beneficiaries.

SUBSECTION (2).—*Essentials to Valid Creation.*

**1051.** The essentials to the valid creation of a real money burden, either by reservation or constitution, are—

(1) The creditor in the burden must be named or clearly pointed out.<sup>1</sup>

(2) The sum must be specific in amount.<sup>2</sup> It must be for a definite sum in money or its equivalent, *e.g.* an obligation to purchase and transfer a sum of £5000 in Consols, which has been held good;<sup>3</sup> but the conditions under which it is imposed must not be too indefinite.<sup>4</sup> It has also been decided that an obligation *ad factum præstandum* can be made a real burden on land,<sup>5</sup> though “a right of shooting cannot be made a real burden on lands so as to exclude the proprietor from shooting over them.”<sup>6</sup>

(3) The burden must be imposed on the lands, and not merely on the disponee. While no *voces signatæ* are necessary, the terms employed must clearly express or plainly imply that the subject itself is to be affected, and not the grantee and his heirs only.<sup>7</sup> Thus, where the disposition only bears that the disponee shall be burdened with and be bound to pay the amount, without imposing the burden on the lands themselves, there is no valid constitution of a real burden.<sup>8</sup> The same result follows (a) where the disposition merely contains an obligation on the disponee, his heirs, executors, and successors;<sup>9</sup> (b) where it only bears to be granted under burden of the sum secured, and imposes it on the disponee by acceptance;<sup>10</sup> (c) where it simply declares that the disposition is granted under burden of the payment of the sums specified to the persons named.<sup>11</sup> In all these cases the burden is merely made a personal obligation upon the disponee and his representatives.

(4) It must appear in the dispositive clause of the conveyance.<sup>12</sup> This is the ruling clause of the disposition, and the burden, in order to form a proper incumbrance upon the subject conveyed, must be there constituted. It is only in cases of ambiguity that other clauses or expressions in the deed can be admitted in explanation of that clause.<sup>13</sup> A real

<sup>1</sup> Ersk. ii. 3, 50; *Stenhouse v. Innes and Black*, 1765, Mor. 10264.

<sup>2</sup> *Stenhouse, supra*; *Allan v. Cameron's Crs.*, 1780, Mor. 10265; 2 Pat. 572; *Aberdeen Tailors v. Coutts*, 1834, 13 S. 226; 2 S. & M'L. 609; 1 Rob. App. 296.

<sup>3</sup> *Edmondstone v. Seton*, 1888, 16 R. 1.

<sup>4</sup> *Ewing's Trs. v. Crum Ewing*, 1923 S.C. 569.

<sup>5</sup> *Edmondstone, supra*.

<sup>6</sup> *Beckett v. Bisset*, 1921 (O.H.), 2 S.L.T. 33.

<sup>7</sup> *Aberdeen Tailors v. Coutts, supra*.

<sup>8</sup> *Mackenzie v. Lord Lovat*, 1721, 3 Ross L.C. 1; affd. Robertson's App. 607.

<sup>9</sup> *Forbes' Trs. v. Gordon's Assignees*, 1833, 12 S. 219.

<sup>10</sup> *Martin v. Paterson*, 1808, Mor., Personal and Real, No. 5.

<sup>11</sup> *Stewart v. Hoonie*, 1792, Mor. 4649; *Macintyre v. Masterton*, 1824, 2 S. 664; *Mackenzie v. Clark*, 1903, (O.H.) 11 S.L.T. 428.

<sup>12</sup> *Allan, supra*; *Williamson v. Begg*, 1887, 14 R. 720.

<sup>13</sup> *Chancellor v. Mosman*, 1872, 10 M. 995.



burden cannot be constituted by a general disposition, as that contains no particular description of the lands or subjects to be burdened. This was in use to be rectified by an appropriate notarial instrument.<sup>1</sup> Now the burden can be made real by expeding a notice of title on the debtor-proprietor's title and specifying the amount of the money burden, the name and designation of the creditor, and the writ or writs imposing same.<sup>2</sup>

(5) The burden must enter and be kept in the Record.<sup>3</sup> Reference to a recorded deed containing the burden is competent, but the original constitution of the burden in that deed must have been in accordance with the legal requirements already mentioned.<sup>4</sup> A reference in the original disposition to a separate deed as containing the declaration of the burden is insufficient.<sup>5</sup> That the burden, even although duly charged upon the lands, should enter the record, is of the utmost consequence in a question of competition with a subsequent heritable creditor.<sup>6</sup>

#### SUBSECTION (3).—*Importing Burdens by Reference.*

1052. The Conveyancing Act of 1874<sup>7</sup> provided additional facilities for references to real burdens, the enactment being in these terms :—

“Reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations affecting land may be validly and effectually imported into any deed, instrument, or writing relating to such lands, by reference to a deed, instrument, or writing applicable to such lands, or to the estate of which such lands form a part, recorded in the appropriate register of sasines, and in which such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations are set forth at full length, and a reference in the form set forth in Schedule H hereto annexed, or in a similar form, shall be sufficient. And it shall be lawful for any proprietor of lands to execute a deed, instrument, or writing setting forth the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations under which he is to feu or otherwise deal with or affect his lands or any part thereof, and to record the same in the appropriate register of sasines. And the same being so recorded, such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations may be effectually imported, in whole or in part, by reference into any deed or conveyance relating to such lands subsequently granted by such proprietor, or by his heir or successor, or by any person whatsoever,

<sup>1</sup> *Cowie's Trs. v. Cowie*, 1891, 18 R. 706, and *Cowie v. Muirden*, 20 R. (H.L.) 81; *Morrison's Trs. v. Webster*, 1878, 5 R. 800; *Scott v. Scott*, 1898 (O.H.), 6 S.L.T. 119.

<sup>2</sup> Conveyancing (Scotland) Act, 1924, 14 & 15 Geo. V. c. 27, s. 4 and Schedule B 1.

<sup>3</sup> *Coutts, supra.*

<sup>4</sup> 10 & 11 Vict. c. 48, s. 5, re-enacted 31 & 32 Vict. c. 101, “1868 Act.”

<sup>5</sup> *Allan v. Cameron's Crs.*, 1780, Mor. 10265; 2 Pat. 572; *Wylie v. Allan*, 1830, 8 S. 337.

<sup>6</sup> *Mackenzie v. Clark*, 1903 (O.H.), 11 S.L.T. 428.

<sup>7</sup> 37 & 38 Vict. c. 94, s. 32.

provided it is expressly stated in such deed or conveyance that it is granted under the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations set forth in such deed, instrument, or writing." Schedule H runs as follows :—

The reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations [*or as the case may be*], specified in [*refer to the deed, instrument, or writing in such terms as shall be sufficient to identify it, and specify the register in which it is recorded, and the date of registration, or where the deed, instrument, or writing referred to is recorded, on the same date as the deed, instrument, or writing containing the reference, here say recorded of even date with the recording of these presents*].

**1053.** The section deals first with the ordinary case of a reference to a recorded deed, and prescribes that the only valid reference must be to a deed where the burdens are set forth at full length. This was and still is in accordance with practice. The second portion of the section introduces a method whereby real burdens may be imported by reference into feu rights. These real burdens, however, can hardly be money burdens in the ordinary sense, as feuars are usually entitled to get their grants clear. The provision has not been extensively used, although deeds specifying reservations, types of buildings, walls or fences, the sharing of expense of roads, sewers, and drains, and other conditions generally applicable to feuing areas have been put on record and then imported by reference into the feu rights. This course shortens the charter, but the actual shares of the cost of accommodation works, such as roads and sewers, are usually definitely fixed in the charter itself and declared real burdens and run with the land.

SUBSECTION (4).—*Effect of Clause of Irritancy, and Clause of Direction.*

**1054.** An irritant clause, while it may raise a presumption of intention, will not make real a burden clearly personal, or otherwise defectively imposed.<sup>1</sup> But it is of importance, inasmuch as it may effectively prevent the omission of the burden from the original infestment, and from subsequent transmissions. If there is no irritancy, an infestment might be expedite, omitting the declaration of the real burden, the disponent be thus divested, and the burden not be made real. If, however, the disposition provides for the insertion of the burden under pain of an irritancy, its omission would nullify the instrument, and the granter would remain infest and undivested.<sup>1</sup> The irritant clause should also be made to apply to the omission of the burden, or of a valid reference thereto, in all future transmissions. A *clause of direction* may also be used in a conveyance in order to prevent the omission of burdens from the infestment of an original disponent.<sup>2</sup>

<sup>1</sup> *Coutts, supra.*

<sup>2</sup> 31 & 32 Vict. c. 116, s. 12.

SECTION 3.—NATURE OF CREDITOR'S RIGHT, AND MODE  
OF ENFORCEMENT.

**1055.** The real money burden, although a heritable right or lien upon the lands, is not a proper feudal estate, and the creditor in it is not infeft in the lands in security of the sum due. His real right is completed by the infeftment of the disponee. The burden imposes no personal obligation on the disponee. The creditor has no active title of possession, no power of sale of the lands, and no direct title as such creditor to raise an action of maills and duties, or to arrest the rents or other funds of the debtor. But when the real burden has been duly constituted, it is a sufficient warrant for an action of poinding of the ground, and the creditor can also lead an adjudication,<sup>1</sup> after which the remedy of an action of maills and duties will be open to him. The powers of the creditor in a reserved burden may, however, be enlarged by express stipulation.<sup>2</sup> When a personal obligation is desired, a personal bond by the disponee may be taken either in the disposition or apart; but this personal obligation will not transmit against a singular successor in the subjects unless he expressly undertake it.<sup>3</sup> If the personal obligation is contained in the disposition constituting the real burden, it may be transmitted by an agreement *in gremio* of a subsequent conveyance.<sup>4</sup> But for effectual transmission the deed containing the agreement must be signed by the disponee, and in cases where obligation results from succession, gift or bequest, summary diligence will not be competent unless there is an agreement to the transmission of such obligations signed by the obligant.<sup>5</sup> The personal obligation, when taken, is enforceable in the same manner as a personal bond. Where the disponee remains uninfeft, the granter remains undivested, and the burden is merely a qualification on the disponee's personal right. But an assignee of the latter will take the personal title subject to the burden and qualification.<sup>6</sup>

#### SECTION 4.—FORM OF DISPOSITION.

1056. The disposition bears to be granted in consideration of a certain sum (if any) paid.

And in consideration of the further sum of £    herein declared to  
be a real burden upon, and affecting the subjects and others after disposed, and  
which sums of £    and £    make up the agreed on price  
of the said subjects and others.

<sup>1</sup> Bell, Com. i. 753.

<sup>2</sup> *Wilson v. Fraser*, 1822, 1 S. 316, and 2 Sh. App. 162.

<sup>3</sup> *Gardyne v. Royal Bank*, 1851, 13 D. 912; rev. 1853, 1 Macq. 358.

<sup>4</sup> 37 & 38 Vict. c. 94, s. 47; *Carrick v. Rodger, Watt & Paul*, 1881, 9 R. 242; *Ritchie and Sturrock v. Dullatur Feuing Co.*, 1881, 9 R. 358.

<sup>5</sup> 14 & 15 Geo. V. c. 27, s. 15.

<sup>6</sup> Bell, Convey. 1152.







duty of 2s. 6d. per cent. on the burden ;<sup>1</sup> a personal bond, as being a collateral security, in 6d. per cent. ; writs of acknowledgment and Notices of Title, including the certificate under s. 49 of the 1874 Act, and the certificates under ss. 32 and 42 of the 1924 Act, each in a duty of 5s. ; minutes excluding or removing the exclusion of executors, in 10s. (doubts have been expressed on this point) ; assignations and discharges, in 6d. per cent. ; deeds for effectuating the appointment of a new trustee, in a duty of 10s., but where containing a general or special conveyance, 20s. ; partial discharges, 10s. each, or 6d. per cent. on the total amount of the burden, if less than £2000—the last discharge being liable in 6d. per cent. on the total amount of the burden ; restrictions, where no price paid, 10s., or 6d. per cent. on the total amount of the burden, if less. A clause of restriction, when added to or embraced in a partial discharge or in a conveyance does not affect the stamp duty.<sup>2</sup>

#### SECTION 7.—TRANSMISSIONS INTER VIVOS, AND PREFERENCE IN COMPETITION WITH THIRD PARTIES.

**1059.** Prior to 1st Oct. 1874 real money burdens (as never having previously been the subject of, but merely a burden on, the infeftment) were transferred by assignations intimated to the debtor. These assignations were usually recorded in the register of sasines, but intimation to the debtor was the proper mode of completing the title ; and accordingly, in cases of competition, questions of preference were decided by priority of intimation.<sup>3</sup> The Act of that year,<sup>4</sup> however, provided that—

“No deed, instrument, or writing executed or dated after the commencement of this Act, whereby any real burden upon land shall be hereafter assigned, conveyed, or transferred, shall be effectual in competition with third parties, unless the same is recorded in the appropriate register of sasines ; and such deed, instrument, or writing shall take effect in competition with third parties only from the date of such registration ; and intimation, according to the existing law and practice, shall be unnecessary when such deed, instrument, or writing is recorded.” Provision was also thereby made for completion of title to and extinction or restriction of real burdens all in the same manner as ordinary heritable securities. The forms prescribed thereby and by the Act of 1868 are declared to be available under the Act of 1924.<sup>5</sup> “Heritable security” includes “Real burdens.” The simpler forms provided for dealing with such securities are equally available for real burdens including all necessary “Notices of Title” in place of the old Notarial Instrument. If under a disposition the grantee agrees to take over, as part of the price, a real burden constituted by another deed, and the disposition contains a personal obligation by such grantee for the amount thereof,

<sup>1</sup> 54 & 55 Vict. c. 39 (Stamp Act), ss. 57 and 86.

<sup>2</sup> Grierson, *Law of Stamp Duties*, p. 193.

<sup>4</sup> Conveyancing Act, 1874, s. 30.

<sup>3</sup> *Miller v. Brown*, 1820, Hume, 540.

<sup>5</sup> Secs. 2 and 4, Schedule B, 1, and notes.

this personal obligation should in future transmissions be assigned as well as the real burden.<sup>1</sup>

SECTION 8.—SUCCESSION, AND THE COMPLETION OF TITLE OF  
EXECUTORS, DISPONEES, LEGATEES, OR HEIRS.

SUBSECTION (1).—*Succession.*

1060. Previous to the 1874 Act, the real money burden descended to the heir, who took up the right by general service.<sup>2</sup> That Act<sup>3</sup> provided that the enactments of the 1868 Act (which made heritable securities moveable in most cases)<sup>4</sup> “shall be taken to apply, and shall apply as nearly as may be, to real burdens upon land,” an exception being made in the case of ground annuals, whether redeemable or irredeemable. The result is that real burdens are now moveable as regards the succession of the creditor, and belong to his executors or representatives *in mobilibus*, except (1) when they have been conceived expressly in favour of such creditor and his heirs and successors, or assignees, excluding executors; or (2) where the creditor has excluded executors by a minute,<sup>5</sup> recorded in the appropriate register of sasines. In the case of an unrecorded security or conveyance, or deed relating to the security, the minute may be indorsed on the deed; (3) ground annuals; (4) *Quoad fiscum* (*i.e.* as regards the rights of the Crown under the Act 1661, c. 32, to the moveable estate of persons denounced rebels). Accordingly real burdens do not fall under the single escheat; (5) courtesy; (6) terce; (7) *jus relictæ*, and consequently *jus relictæ*; and (8) legitim—in which cases, and as to all which rights, the real burden remains heritable. Bygone interest, however, falls to executry. The exclusion of executors may be removed by the creditor (*a*) executing and recording a minute<sup>6</sup> in the appropriate register of sasines, or (*b*) assigning, conveying, or bequeathing the security or burden to himself, or to any other person, without expressing or repeating the exclusion. In the latter case the removal of the exclusion takes effect on the assignation, conveyance, or bequest becoming effective—namely, in the case of an *inter vivos* assignation or conveyance, on delivery or recording; of a *mortis causa* assignation or conveyance, on the testator’s death; and of a bequest, on vesting. The exclusion of executors (seldom, however, met with) may thus be imposed and removed at pleasure. An opinion was expressed that the 1868 Act made heritable securities moveable only in cases of intestate succession, *i.e.* in cases of competition between heir and executor,<sup>7</sup> but it was decided later that the Act makes them moveable as regards succession testate or intestate.<sup>8</sup>

<sup>1</sup> Wood’s Conveyancing, p. 505.

<sup>2</sup> *Cuthbertson v. Barr*, 1806, Mor. App. Service and Confirmation, No. 2.

<sup>3</sup> Sec. 30.

<sup>4</sup> Sec. 117.

<sup>5</sup> 1868 Act, Form DD.

<sup>6</sup> 1868 Act, Form EE.

<sup>7</sup> *Hare (Petitioner)*, 1889, 17 R. 105.

<sup>8</sup> *Hughes’ Trs. v. Corsane*, 1890, 18 R. 299.

SUBSECTION (2).—*Completion of Title.*

**1061.** In the 1868 and 1874 Acts there were prescribed sundry modes, but these have now been rendered of little consequence through the introduction of simpler forms by the Act of 1924. The following table shews the forms available :—

(1) *Where Creditor's Title is complete*—(by the infestment of the debtor, and also, where there have been transmissions, by the last creditor's title having been recorded).

| Successors.   | 1868 and 1874.  | 1924.  |
|---|---|--|
| Executors-nominate (confirmed),<br>Disponees, Legatees.   | Writ of Acknowledgment<br>from debtor, <sup>1</sup> or Notarial<br>Instrument. <sup>2</sup>                 | Same or Notice of<br>Title B 3.                                      |
| Heirs including heirs of pro-<br>vision.  | Writ of Acknowledgment, or<br>Notarial Instrument with<br>service. <sup>3</sup>                             | Same or Notice of<br>Title B 3.                                      |
| Executors-dative (confirmed).<br>Trustee in Bankruptcy.<br>Assignee under deed for further<br>purposes. | Notarial Instrument. <sup>3</sup><br>Notarial Instrument. <sup>4</sup><br>Notarial Instrument. <sup>5</sup> | Notice of Title B 3.<br>Notice of Title B 3.<br>Notice of Title B 3. |
| (2) <i>Where Creditor's Title is personal.</i>  |   |  |
| All Successors.   | Notarial Instrument. <sup>6</sup>   | Notice of Title B 5.   |

Under the Act of 1924 no description of the property or burden is required in the deed completing title, and the form is otherwise so simple that the methods hitherto in use need no longer be employed.

## SECTION 9.—DISCHARGE OR EXTINCTION.

**1062.** The incumbrance is extinguished as ordinary debts are. The invariable practice—even before the 1874 Act, which assimilated the mode of discharging real burdens to that of other heritable securities—when the burden was extinguished by payment, was to obtain and record a discharge in the appropriate register of sasines. The forms rendered applicable (under the 1874 Act, s. 30) were of discharge, Schedule NN, and of deed of restriction, Schedule OO in the Act of 1868, but the forms now are 3 and 5 of Schedule K of the 1924 Act. The form for disencumbering the lands where a discharge could not be obtained was formerly Schedule L, No. 2, authorised by s. 49 of the 1874 Act, but the form now is Schedule L 4 of the Act of 1924.

<sup>1</sup> 1868, Sched. 2 under s. 63 of 1874.

<sup>2</sup> 1868, Sched. KK under s. 64 of 1874, or Sched. N of 1874.

<sup>3</sup> 1868, Sched. JJ (Heirs of Provision—*Hare*, 1889, 17 R. 105).

<sup>4</sup> 1868, Sched. LL.      <sup>5</sup> 1868, Sched. HH.      <sup>6</sup> 1868, Sched. MM.



**1063.** While the above represent the formal methods of clearing an incumbrance, something less will suffice.<sup>1</sup> *Obiter dicta* in the case cited (which related to the delivery of a clear title) are unusually advanced. Thus Lord Kyllachy: "If the debt is extinguished there can be no doubt that the infetment in security is also extinguished;" and Lord Adam: "If the debt is paid there is an end of the infetment in security and there is no necessity to clear the record." Notwithstanding those opinions, the practice hitherto has been to record a definite discharge and disburdenment of the debt or incumbrance. The form for extinguishing a heritable security provided by the Act of 1924<sup>2</sup> (which is also applicable to real burdens for money<sup>3</sup>) is a simple discharge of the bond or burden, the constituting deed being identified, and contains no reference to the subjects. The enacting section<sup>4</sup> states that by adopting this form the security "may be effectually renounced and discharged and the land therein effectively disburdened of the same." This apparently does not preclude the use of an equally clear discharge in another form, nor render nugatory the opinions above expressed. At the same time it is clear that it would be inadvisable merely to accept a simple receipt from the creditor for his money as permanent evidence of extinction of a heritable security, as receipts disappear and creditors die and the record remains uncleared. Conveyancers, will therefore find those words of Lord Kinnear in the same case still worthy of attention: "I am far from saying that a purchaser is bound to accept evidence extrinsic of the record as sufficient to clear the lands of an incumbrance."

#### SECTION 10.—PERSONAL BURDENS.

**1064.** The nature of these has already been indicated. Where the grantee is taken bound by acceptance of the right, but where there is no clause charging the subject, or where the clause and infetment do not conform to the rules applicable to real burdens before laid down, the burden (assuming it to be otherwise lawful) is personal, and will be binding on the grantee and his representatives, while not affecting the subject itself. The mode of constitution and recovery is that applicable to an ordinary debt, regard being had to the terms of the obligation.

#### SECTION 11.—OTHER BURDENS.

**1065.** The following is an enumeration of the other burdens affecting heritable subjects or the proprietors thereof, which will either be found dealt with under their respective heads, or referred to in other titles of the present work—(a) Burdens arising *ex lege* or by force of fiscal and other Statutes, *e.g.* land tax, ecclesiastical assessments, and public burdens, succession duties,<sup>5</sup> estate duties<sup>6</sup>; (b) *terce* and *courtesy*, arising from

<sup>1</sup> *Cameron v. Williamson*, 1895, 22 R. 293.

<sup>2</sup> Sched. K 3.

<sup>3</sup> Note 4 to Sched. K.

<sup>4</sup> 1924, s. 29.

<sup>5</sup> 16 & 17 Vict. c. 57, s. 42.

<sup>6</sup> 57 & 58 Vict. c. 30, s. 9, and numerous subsequent Acts varying rates and provisions. See ESTATE AND OTHER DEATH DUTIES.



the marital relations ; (c) stipend as a “ real burden on the lands from the teinds of which it is exigible preferable to all other securities or burdens not incidents of tenure ; ” <sup>1</sup> (d) casualties of superiority, <sup>2</sup> non-entry, relief, composition, liferent escheat ; (e) obligations and restrictions created and imposed by Statute, *e.g.* those under the General Police, Public Health, and special Municipal Acts ; (f) public nuisance ; (g) burdens arising from or under grants express or implied from the Crown or subject superior, *e.g.* Crown duties and feu-duty (with additional feu-duty, taxed casualties, and services) ; reservations, as of minerals, salmon-fishings, or sporting rights ; servitudes, *e.g.* mill-dam and lade ; bleaching ; rights of way (peat, foot, horse, drove, or cart roads, as distinguished from public rights of way), pasturage, thirlage, feal and divot, stone and slate, sand and gravel, sea ware for manure, and the urban servitudes of light, air, and prospect (but not cutting timber, kelp for manufacture, golfing, *jus spatiaandi*, trout-fishing, etc.) ; building conditions, including conventional nuisance ; (h) burdens arising under family settlements, or deeds creating a limited ownership, *e.g.* entail, liferents, localities, provisions and annuities ; (j) burdens arising under special contracts or security deeds, *e.g.* entailers’ debts, real warrandice <sup>3</sup> (including that implied in excambions), heritable securities and ground annuals ; (k) burdens affecting possession, as feu, leasehold, and crofters’ rights ; (l) burdens arising or imposed by prescription—*e.g.* public rights of way, as well as certain of the servitudes above enumerated ; (m) burdens imposed by diligence or judicial decision, *e.g.* inhibition, adjudication for debt (where adjudication is looked on as a title to lands, it, on the other hand, is subject to the burden of redemption and expiry of the legal), interdiction, <sup>4</sup> inhibition and adjudication implied in mercantile sequestration, litigiousity, and jedge warrants of the Dean of Guild Court in respect of repairs.

<sup>1</sup> Church of Scotland Act, 1925, 15 & 16 Geo. V. c. 33, s. 12.

<sup>2</sup> Subject to 1874 Act ; 1914 Act, 4 & 5 Geo. V. c. 48 ; 1920 Act, 10 & 11 Geo. V. c. 34.

<sup>3</sup> All rights of real warrandice expire on 31st Dec. 1944, s. 14 of 1924 Act.

<sup>4</sup> These expire 31st Dec. 1929, s. 44 of 1924 Act.

## BURDENSECK.

*See* CRIME.

# BURGAGE.

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## SECTION 1.—BURGAGE TENURE.

### SUBSECTION (1).—*Nature of Tenure.*

**1066.** In the feudal system burgage tenure is a manner of holding of lands and buildings within the territories of royal burghs. These burghs were created or “erected” by force of a royal charter granting jurisdiction and liberties; providing for (or implying) services of watching and warding; and, it might be, stipulating for payment of a certain “burgh mail” to the king. The charter might or might not define the territory of the burgh more or less exactly. It is not, however, to be understood that burgage tenure was limited to within the burgh wall or to the town. The territory of the burgh might extend far beyond. Nor, on the contrary, does it follow that everything within these limits is or was burgage. There might be exceptions, express or implied, in the charter of erection, applicable to property held in feu of subject-superiors, which was especially the case when a burgh of regality was raised to the status of a royal burgh. In that case the charter applied to the effect of constituting such property part of the burgh, but the feu-holding and the superior's rights were preserved intact. Again, the burgh might, after its erection, acquire additional territory by purchase or otherwise; that would not be burgage except by force of a new erection. An exception of another kind arises from the granting of feus of property held burgage.<sup>1</sup> It is to be observed

GENERAL AUTHORITIES.—Ersk. II. iii. 41, II. iv. 8; Bell, Prin. 685, 838; Menzies, Lectures, 786; Bell, Conveyancing, 3rd ed., 569, 652, 792, 1116; Juridical Styles, 1st ed.

<sup>1</sup> As to the question of its abolition, see *infra*, para. 1071.

that the term burgage as here used is descriptive of a feudal *tenure*, not of a burghal or other *area*. The last-mentioned exception, indeed, shews that the same property may be held burgage and non-burgage at the same time, but in different relations.

**1067.** This tenure is proper only to royal burghs, and not to burghs of any of the other kinds known to the law of Scotland; but there are indications that burghs of regality might acquire by custom some of the qualities of burgage tenure. Musselburgh, indeed, is an instance of a burgh of regality with titles bearing to be held of His Majesty in free burgage; but Musselburgh, though not a royal burgh, holds a royal charter. Accordingly, it appears that not only might there be a royal burgh without proper burgage tenure, but also, on the other hand, that there might be burgage tenure, or an approximation to it, elsewhere than in a royal burgh.

SUBSECTION (2).—*Burghs with and without Burgage Tenure and Registers.*

**1068.** Apart from Coatbridge, which is a statutory addition, there are seventy-one royal burghs in Scotland. Of these, sixty-four have burgage tenure and a burgh register of sasines; six have neither; and Paisley has booking tenure and register. Musselburgh, which, as just mentioned, has a burgage tenure though only a burgh of regality, has no burgh register. The following are the sixty-four royal burghs with burgage tenure and burgh register:—Aberdeen, Annan, Anstruther Wester, Arbroath, Auchtermuchty, Ayr, Banff, Bervie, Brechin, Burntisland, Crail, Cullen, Culross, Cupar-Fife, Dingwall, Dumbarton, Dumfries, Dunbar, Dundee, Dunfermline, Dysart, Earlsferry, Edinburgh, Elgin, Falkland, Forfar, Forres, Fortrose, Glasgow, Haddington, Inverkeithing, Inverness, Inverurie, Irvine, Jedburgh, Kinghorn, Kintore, Kirkcaldy, Kirkcudbright, Kirkwall, Lanark, Lauder, Linlithgow, Lochmaben, Montrose, Nairn, Newburgh, New Galloway, North Berwick, Peebles, Perth, Pittenweem, Queensferry, Renfrew, Rothesay, Rutherglen, St. Andrews, Sanquhar, Selkirk, Stirling, Stranraer, Tain, Whitehorn, Wigtown.

**1069.** The six royal burghs which have neither burgage tenure nor registers are: Anstruther Easter, Campbeltown, Dornoch, Inveraray, Kilrenny, and Wick. None of these ever had either burgage tenure or burgh register, except Dornoch, which had both. The Dornoch register was discontinued in 1809, and thereafter the burgage tenure was gradually superseded. The case of burghs with burgage tenure but with no register is specially provided for in section 151 of the Titles to Land (Consolidation) Act, 1868.<sup>1</sup> The writs are recorded in the county register. The terms of that section, and also of section 153, are important in connection with what has been said above regarding the

<sup>1</sup> 31 & 32 Vict. c. 101.

burghs in which burgage tenure is found. Section 151 speaks of “*any burgh in which lands are held burgage*”; and section 153 expressly refers, in a similar connection, to “*any royal or other burgh*.”

1070. It does not clearly appear what formalities or changes took place regarding the holding and titles of the individual owners on the erection of an area into a royal burgh. There is, however, authority for the statement that the grant to the community did not require sasine to perfect it. This certainly was so in the case of a re-erection.<sup>1</sup> The same case establishes the power of the magistrates to prescribe a right of property for the community, notwithstanding the inclusion of the same subjects in private burgage titles renewed by the magistrates from time to time, but not clothed with possession.

#### SUBSECTION (3).—*Who is Vassal?*

1071. The questions have been much discussed: Who is vassal in burgage tenure, the community of the burgh or the individual owner? and, What is the true aspect of the relation between the community and the individual owner? The answers are, that the only feudal superiority is in the Crown; that the community hold direct of the Crown their common property (so far as included in the royal charter), and also their burghal capacity and estate, with all attaching rights and privileges; and that the individual burgage owner holds his private property also direct of the Crown, and not of the community. That the burgh holds direct of the Crown is evidenced by the charter; the burgh in its origin is the legal creation of the Crown. It is this direct tenure that distinguishes royal burghs from burghs of regality. Robert the Bruce, indeed, attempted to interpose subject-superiors, as in the case of his grant of the royal burghs of Elgin, Forres, and Nairn to Randolph, Earl of Moray; but the attempt was frustrated by statute.<sup>2</sup> In like manner, it is beyond doubt that each individual owner holds his property direct of the Crown. The titles have always been express to that effect. Before 1847, on the occasion of a sale, the resignation by the seller was in the hands of the magistrates, as in the hands of the Sovereign, “*immediate lawful superior thereof*”; and the Act of that year prescribed similar words, namely, “*to be holden of Her Majesty in free burgage*.” Further, when a burgh was suppressed, the owners continued to hold direct of the Crown, but by blench tenure.

1072. It is necessary to keep distinct the two matters of feudal superiority and municipal jurisdiction and authority. “*Though the bailies of the burgh have a superiority in point of dignity and jurisdiction over their fellow-burgesses, they are not for that reason superiors of the burgh in a feudal sense.*”<sup>3</sup> But the two are co-related, for no burgage-holder could be infeft prior to 1847 without the intervention

<sup>1</sup> *Ayloun v. Mags. of Kirkcaldy*, 1833, 11 S. 676.

<sup>2</sup> Innes, *Legal Antiquities*, 117.

<sup>3</sup> *Ersk. II. iv. 9.*



of one of the bailies and the town clerk. The origin of this rule is to be found in the Act 1567, c. 27 (34). It provides :—

Forsameikle as the greit hurt done of befor within burgh be geving of sesingis privatlie without anie baillie and ane common clerk of burgh quhairthrow our Soverane Lordis liegis may bee defraudit greitlie, Theirfoir it is statute and ordanit . . . that na sesing be gevin within burgh of ony maner of land or tene-ment within the samin in ony tyme cuming, bot be ane of the baillies of the burgh and the commoun clerk theirof : And gif ony sesing beis utherwayis gevin heirefter, to be null and of nane avail, force, nor effect.

Notwithstanding some expressions apparently to the contrary, this Act is limited to burgage tenure ; that is the true meaning of the phrase “within burgh.” The action of the magistrates under the statute was purely ministerial or executorial on behalf of the Crown. So strong was the rule requiring the intervention of the bailies, that a subsequent sasine so expedite was preferred to a prior infeftment by direct act of the Crown.<sup>1</sup> And even yet no one can be infeft in a burgage property without the intervention of the town clerk, inasmuch as he still acts as keeper of the burgh register. This, indeed, does not now hold in the cases where there is no burgh register, and it is expected that legislation will shortly pass under which the separate burgh registers will be merged in the General Register of Sasines.

## SECTION 2.—PECULIARITIES OF BURGAGE HOLDING.

**1073.** The peculiarities of burgage holding, as contrasted with other feudal tenures, are generally stated as: (1) no feu-duty; (2) no casualties; (3) greater freedom of alienation, but only by way of transferring the existing estate; for (4) it is generally laid down that the individual burgage vassal could not sub-feu. But each of these points requires explanation and modification.

### SUBSECTION (1).—*No Feu-duty.*

**1074.** The distinction grounded on the absence of feu-duty takes us back to the question, Who is the vassal? If the community be regarded as, or as representing, the vassal to certain effects, it may very well be said that the “burgh mail” before referred to was of the nature of a feudal payment or duty. But as regards the individual owner, there can be no feu-duty. It has been attempted in many cases to attach feu-duties to burgage tenure, but it has been clearly decided that to do so is incompetent and impossible.<sup>2</sup> Many properties in burghs are indeed held under titles which, while expressly declaring the holding to be burgage of the Crown, go on to condition that the property is so held for payment to the magistrates or other parties of an annual “feu-

<sup>1</sup> *C. Kincardine v. E. Marr*, 1686, Mor. 6894.

<sup>2</sup> *Mags. of Arbroath v. Dickson*, 1872, 10 M. 630.

duty." The stipulated sums, however, are not feu-duties, nor can they be sustained as real burdens; but the proprietor for the time being, who has taken his title subject to the so-called feu-duty, is under personal liability for it for the period of his ownership. A clause requiring all new proprietors to give personal obligations for these payments is not enforceable.<sup>1</sup> Even in old titles, there can be no implied casualties. The person in right of these payments is a mere encumbrancer at best, and has no relation of tenure to the property, and is not, apart from clear agreement, bound to relieve the proprietor of any so-called "over-feu-duty" or prior real burden. These cases are to be distinguished from each of two separate operations, namely, the creation of (1) ground-annuals, and (2) sub-feus. Of these the former always was, and the latter was in 1874 declared always to have been, an effectual method of alienating burgage property under reservation of a permanent annual payment. The constitution of a ground-annual was the usual method before 1874, on account of the inability (real or assumed) to grant sub-feus. The principle of *Dickson's* case<sup>2</sup> is the incompatibility of burgage tenure and feu-duty. There may be either, but not both. The method by ground-annual is effectual, because in it we have burgage without feu-duty; and the method by sub-feuing is effectual, because in it we have feu-duty without burgage. The ground-annual is not a feu-duty, but is merely a definite annual sum aptly reserved. Again, in the case of sub-feuing, the feu-duty is attached, not to the burgage tenure under which the granter of the feu himself holds, but to the ordinary feudal tenure under which the new vassal is to hold.

**1075.** But while, in the case of the individual owner, there is not, and never was, any feudal payment, it is not to be inferred that there was no *reddendo* or return for the holding. It has already been stated that the charters of erection often expressed the condition of watching and warding as services to be rendered in return for the grant. But even though the charter was silent on the subject, these services were due by implication. They had reference to keeping order within the burgh, and warding off attacks from without. This again suggests the co-relation of the municipal and feudal functions in burgage tenure. The responsibility for order lay on the magistrates, and theirs was the duty of organising the town's bands; but the members of the force must needs be obtained from the individual burgesses. An interesting reference to this old burgage obligation of watching and warding is found in the Act for disarming the Highlands after the Rebellion of 1715.<sup>3</sup> It contains (s. 6) an exception in the form of licence to "the magistrates of every burgh royal to have in their custody a sufficient number of arms for keeping guard within their burghs, and the inhabitants of burghs royal to use the said arms in keeping guard, according

<sup>1</sup> *Tailors of Aberdeen v. Coutts*, 1840, 1 Rob. App. 296; *Mags. of Aberdeen v. Wyllie*, 1870, 43 Sc. Jur. 95.

<sup>2</sup> *Mags. of Arbroath v. Dickson*, 1872, 10 M. 630.

<sup>3</sup> 1 Geo. I. c. 54.

to the directions of their respective magistrates." And the statutory clause of obligation to infeft introduced by the 1847 Act was declared to imply an obligation to infeft "for service of burgh used and wont."

#### SUBSECTION (2).—*Casualties.*

**1076.** If liferent escheat be accounted a feudal casualty, it is not correct to say that burgage knew or knows no casualty. Hope specially refers to this, and indeed expresses himself quite generally: "The casualties of superiority belong only to the King, such as liferent escheat by horning." He admits there is no non-entry; "whereof," he says, "there is no reason but custom."<sup>1</sup> See also the Act of Annexation, 1587, c. 29, for the distinction between royal burghs and burghs of regality regarding "their non-entries." Erskine,<sup>2</sup> following Craig, gives more definite reasons for the absence of that casualty, as well as those of ward, relief, and marriage, namely, that the burgh "neither marries, dies, nor is minor."

#### SUBSECTION (3).—*Alienation and Subinfeudation.*

**1077.** The liberty of alienation of the existing estate (*i.e.* by substitution as distinct from subinfeudation) was in bold contrast with other feudal tenures. But this contrast gradually diminished as the like freedom was conferred in the other holdings. The contrast was complete only in very ancient times; it disappeared substantially in 1747<sup>3</sup> and absolutely in 1847.<sup>4</sup> And even while this distinction remained in favour of burgage-holding, it was very materially modified by the fact that in the other tenures, while alienation by substitution was more or less incompetent, practically the same result could be reached by subinfeudation, unless that had been specially prohibited.

**1078.** In burgage tenure, on the other hand, it is usually laid down that subinfeudation was incompetent to the individual vassal. By the Conveyancing Act, 1874,<sup>5</sup> this power was expressly given, and all previous sub-feus received statutory confirmation. But indeed there is no clear authority for the proposition even prior to 1874.<sup>6</sup> Security infeftments *de me* were held effectual even before 1874.<sup>7</sup> It was generally held that the magistrates could grant feus of burgage property for an adequate feu-duty.<sup>8</sup> In some instances royal charters contained express power to that effect. The charter of the burgh of Inverurie is an instance.

#### SUBSECTION (4).—*Other Specialties.*

**1079.** Apart from the qualities of the tenure itself, there are a few general points which require mention:—

<sup>1</sup> Minor Practicks, 96.

<sup>2</sup> 20 Geo. II. c. 50, s. 12.

<sup>3</sup> 37 & 38 Vict. c. 94, s. 25.

<sup>4</sup> *Bennet v. Sclanders*, 1711, Mor. 6895.

<sup>5</sup> II. iv. 8.

<sup>6</sup> 10 & 11 Vict. c. 48, s. 6.

<sup>7</sup> Hendry, Manual, 3rd ed., 359.

<sup>8</sup> Lord Deas in *Dickson's case*, *supra*.

(i) *Terce.*

Until 1861 burgage subjects yielded no *terce*. But if the husband died after August 6, 1861, this distinction does not hold.<sup>1</sup> This enactment was repealed by the Statute Law Revision Act, 1892, apparently on the view, which is thought to be sound, that the same result was reached by the 1874 Act.<sup>2</sup> The procedure for completing the widow's right is the same as in feu-holdings.

(ii) *Teinds.*

The erection into a royal burgh does not carry *teinds*, nor does it give a title on which to found prescriptive possession of *teinds*. The fact that property is burgage does not confer exemption from *teind*.<sup>3</sup>

(iii) *Long Leases.*

Although it was not until 1874 that sub-feus by individual burgage owners were recognised, the Registration of Leases Act, 1857,<sup>4</sup> expressly authorised the creation of recorded subordinate rights by way of lease. The only distinctions taken in the Act between feu and burgage tenures are (s. 18), that in the former it is, while in the latter it is not, necessary to set forth in the lease "the name of the lands of which the subjects let consist or form a part" and "the extent of the land let."

(iv) *Commons.*

Commons belonging to royal burghs and held in burgage tenure are exempted from the "Act concerning the dividing of commonties."<sup>5</sup>

(v) *Jedge Warrants.*

These are not limited to burgage tenements, but extend to all buildings in burghs.<sup>6</sup>

## SECTION 3.—TITLES INTER VIVOS.

SUBSECTION (1).—*Disposition.*

**1080.** After 1847,<sup>7</sup> and down to 1860, the differences in a disposition of burgage property as compared with a disposition of a feu-subject were—

1. The obligation to infest was "to be holden of Her Majesty in free burgage."
2. Instead of an obligation to relieve the disponent of feu-duties, casualties, and public burdens, the relative obligation was "to

<sup>1</sup> 25 & 26 Vict. c. 86, s. 12.

<sup>2</sup> Sec. 25.

<sup>3</sup> *Learmonth v. Mags. of Edinburgh*, 1859, 21 D. 890.

<sup>4</sup> 20 & 21 Vict. c. 26.

<sup>5</sup> 1695, c. 38; *Hunter v. Mailler*, 1854, 16 D. 641.

<sup>6</sup> *Peterkin v. Harvey*, 1902, 9 S.L.T. 434; Bell, Com. i. 784.

<sup>7</sup> 10 & 11 Vict. c. 49.



free and relieve the disponent of all cess, annuity, ground-annual, and other public and parochial burdens."

3. The statutory form of warrandice was, "And I grant warrandice *as accords*," which, unless specially qualified, implied absolute warrandice as regards the lands and writs, and warrandice from fact and deed as regards the rents. The addition of the words "as accords" was curious; they would themselves have been held sufficient in certain circumstances to constitute a "special qualification" in the case of non-burgage property.
4. No precept of sasine. The reason was that infeftment could not be effected by confirmation, but only by resignation.

**1081.** The following changes have been made from time to time on the above points:—

Between 1860 <sup>1</sup> and 1868—

1. It was unnecessary to insert any obligation to infeft, but it must always have been convenient to have the distinct statement on the face of the title that the property was held burgage.
2. It was unnecessary to insert a procuratory of resignation; for by the 1860 Act resignation was superseded.

Between 1868 <sup>2</sup> and 1874—

1. There was introduced, in lieu of the obligation to infeft, a simple statement: "to be holden the said subjects of Her Majesty in free burgage."
2. The obligation to relieve referred to "ground-annual, cess, annuity, and other public burdens."
3. The words "as accords" were omitted from the warrandice clause when absolute warrandice was intended.

Since 1874 <sup>3</sup>—

1. There can be no procuratory of resignation, and if it is inserted, it is to be held *pro non scripto*.<sup>4</sup>
2. "There *shall not*, after the commencement of this Act, be any distinction between estates in land held burgage and estates in land held feu, in so far as regards the conveyances relating thereto."<sup>5</sup> But the very next section permits the continued use of "the forms allowed by" the 1868 Act, and merely provides that "the forms applicable to lands held in feu shall be applicable likewise." The two forms are indistinguishable, except that in burgage property (1) in a description by reference, both burgh and county must be specified; (2) though it is not necessary, still it is practically convenient to have the tenure earmarked by the declaration that the property is "to be holden of His Majesty in free burgage"; and (3) in the obligation of relief, the words "feu-duties and casualties" will be left out, and it is usual to specify "ground-annual, cess, and

<sup>1</sup> 23 & 24 Vict. c. 143.

<sup>3</sup> 37 & 38 Vict. c. 94.

<sup>2</sup> 31 & 32 Vict. c. 101.

<sup>4</sup> s. 26.

<sup>5</sup> s. 25.

annuity"; but this clause gives nothing which would not be implied.

#### SUBSECTION (2).—*Infestment.*

1082. In considering the method and forms in which a dispositive of burgage property has from time to time acquired, and now acquires, a real right, the main point to be kept in view is, that the procedure was always by resignation only. The resignation was made in the hands of one of the bailies of the burgh, as representing the Crown. The ceremony took place on the ground of the lands. The persons present were five, namely: (1) the procurator for the disponent and attorney for the dispositive—one person; (2) one of the bailies of the burgh; (3) the town clerk, as notary; and (4, 5) two witnesses. The ceremony was twofold: resignation made by the old proprietor and accepted by the bailie, and sasine given by the bailie to the new proprietor. The symbols in the resignation were staff and baton; and in the sasine, earth and stone, and sometimes hasp and staple. Both acts were recorded in one instrument. It was thus, in fact, an instrument of resignation and sasine, but it was generally described as an instrument of sasine merely. The Act 1681, c. 11 (13), required these instruments to be recorded within sixty days of their date. The town clerk had the monopoly of acting as notary. He appended a long Latin docquet. He and the witnesses signed each page of the instrument.

1083. In 1845<sup>1</sup> the only changes made were, that it was made optional to have the ceremony on the lands or in the council chamber: in the latter case the symbol was a pen; and in any case the docquet was dispensed with. In 1847 the whole ceremony, and all symbols, and the intervention of the provost or a bailie, were superseded. What was substituted was the presentation of the disposition to the town clerk, being a notary public, who thereupon subscribed and recorded an instrument of sasine in a simpler form. The town clerk prefixed his motto to his signature. The witnesses signed the last page only. The instrument might be recorded at any time during the life of the dispositive. In 1860 the instrument was superseded. The disposition was itself recorded, with a warrant. As a compensation to town clerks appointed prior to March 8, 1860, they were allowed to charge, for recording the dispositions, the same fees as they would have charged for preparing and recording an instrument thereon.

Briefly, then, the historical development in its outstanding features has been this:—

|               |   |  |
|---------------|---|--|
| Prior to 1845 | . | Ceremony on the ground and instrument of sasine.                   |
| 1845          | . | Ceremony simplified, but both ceremony and instrument retained.    |
| 1847          | . | Ceremony abolished, but instrument retained.                       |
| 1860          | . | Instrument abolished, and disposition recorded<br><i>de plano.</i> |

<sup>1</sup> 8 & 9 Vict. c. 35.

## SECTION 4.—HEIR'S TITLES.

1084. The outstanding peculiarity of the procedure in the making up of burgage titles in transmissions from the dead to the living was, that where the ancestor died infeft, the bailies of the burgh were, at their own hand, entitled to ascertain and recognise the heir's right. The bailie himself conducted the inquiry, served and cognosced the heir, and gave him sasine. Before 1845 the ceremony took place on the ground of the subjects. The persons present were : (1) the bailie ; (2) the heir or his procurator ; (3) two or more witnesses ; and (4) the town clerk. The bailie took the evidence of the witnesses on the point of propinquity (or this might be dispensed with altogether), and, if satisfied, gave possession by earth and stone and hasp and staple. The heir or his procurator entered the premises and shut the door ; and immediately coming out again, took instruments in the hands of the town clerk as notary. One instrument was expedite to establish the heir's propinquity and infeftment. It was called an instrument of cognition and sasine. The notary and witnesses signed each page. The instrument required to be recorded within sixty days of its date. An alternative method was by special service before the Burgh Court, followed by sasine. It proceeded on the heir's claim without the necessity of any brieve from Chancery. There might, however, be such a brieve. If there was, there was also a retour ; otherwise, not. A third alternative course was a simple writ of *clare constat* by the magistrates, followed by sasine, but this was of doubtful efficacy.

1085. Dealing with the leading method, namely, entry by cognition and sasine, the 1845 Act allowed the ceremony to take place on the premises or in the council chamber ; in the latter case the symbol was a pen, and in either case the notary's docquet was dispensed with. But still the notary and witnesses signed each page, and the sixty days' limit for recording was retained. No changes were made in 1847. The Burgage Tenure Act<sup>1</sup> of that year was limited to transmission *inter vivos*, and the Service of Heirs Act<sup>2</sup> of the same year was specially declared not to touch "the service and entry of heirs *more burgi*." The 1860 Act did not abolish the old procedure, but practically superseded it by an approximation to ordinary feudal forms, two new (or revised and adapted) alternative modes being provided, namely : (1) writ of *clare constat* by the magistrates, recorded with a warrant ; (2) special service before the Sheriff of Chancery or Sheriff of the county in which the burgh is situated, the extract decree being recorded with warrant.

1086. It would appear that entry *more burgi* has since 1874 been, and now is, incompetent in view of section 25 of the 1874 Act, which provides that there *shall not* be any distinction between feu and burgage as regards "the completion of titles." The somewhat inconsistent terms of the following section are limited to "conveyances."

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<sup>1</sup> 10 & 11 Vict. c. 49.

<sup>2</sup> 10 & 11 Vict. c. 47.



**1087.** The special power and monopoly to the bailies in the establishment of the heir's propinquity were limited to the case of the ancestor being infest. If he died with a personal right only, the heir always required to expedite a general service. That gave him right to the unexecuted procuratory of resignation in the ancestor's title, whereupon he resigned in the hands of the bailies as representing the Crown, and was infest under an ordinary burgage instrument of sasine; or, after 1860, he would proceed by notarial instrument, now notice of title.

#### SECTION 5.—REGISTRATION.

**1088.** Much doubt was created by the provisions in the 1874 Act as to the register in which deeds are to be recorded which relate to feus of burgage property. The Act authorised future feus, and further provided as follows :—

The titles of all such feus granted before the commencement of this Act shall be unchallengeable on the grounds that such feus are of land held by burgage tenure, or that such titles have been recorded in the Burgh Register of Sasines. Writs affecting land which immediately prior to the commencement of this Act was held burgage shall be recorded in the Burgh Register of Sasines.<sup>1</sup>

**1089.** There appear to be at least three main questions, namely : In which register—county or burgh—are the following writs to be recorded ?—(1) Transmissions after 1874 of a feu-right constituted before 1874 recorded in the Burgh Register of Sasines; (2) transmissions after 1874 of a feu-right constituted before 1874 recorded in the county register; (3) a feu-charter granted after 1874. Before dealing with these questions it is necessary to state that there is clear authority for the view that, though there was diversity of practice before 1874, the only correct method was to record feu-rights of burgage property in the county register.<sup>2</sup> This is clearly recognised in the legislative relief given to the recording of such deeds in the burgh register, which implies that such relief is necessary—that is, that such recording was wrong.

**1090.** It is generally taken to be the meaning of the Act that, as regards all feus constituted before 1874, wherever recorded, subsequent transmissions are to be recorded in the county register. It is recognised in the Act, as above stated, that they ought always to have been recorded in that register, and the only direction to record in the burgh register is limited to “writs affecting land which immediately prior to the commencement of this Act was held burgage,” which was not the case in the instances supposed.

**1091.** As regards feus constituted after 1874, different views have been expressed, but practice has settled that the burgh register is the competent, and the only competent, record. The proposal to support the opposite view by interpolating the words “other than feu-rights”

<sup>1</sup> s. 25.

<sup>2</sup> *Earl Fife's Trs. v. Mags. of Aberdeen*, 1842, 4 D. 1245.



in the sentence beginning "Writs affecting land," seems altogether inadmissible, as begging the question. It is provided that if the land was held burgage "immediately before the commencement of this Act," the deeds must be recorded in the burgh register; and that is the case in the instance now under consideration.

1092. The following table seems fairly exhaustive :—

| Deeds.   | Proper Register. |
|--|------------------|
| 1. Feu-rights and transmissions thereof recorded before October 1, 1874 . . . . .  | County.          |
| 2. But the 1874 Act in these cases condones registration in the register of the . . . . .  | Burgh.           |
| 3. Transmissions after the Act of feu-rights granted before the Act and recorded in the county register . . . . .  | County.          |
| 4. The same when the feu-right was recorded in the burgh register . . . . .  | County.          |
| 5. A feu-right delivered before, but not recorded till after, the Act . . . . .  | County.          |
| 6. A feu-right delivered after the Act . . . . .   | Burgh.           |
| 7. <i>Novodamus</i> after the Act applicable to ground feued before the Act . . . . .  | County.          |
| 8. Sub-feus after the Act, the superior feu having been constituted before the Act . . . . .   | County.          |
| 9. Disposition of superiority of a burgage feu . . . . .   | Burgh.           |
| 10. Minute of consolidation when the superiority title falls to be recorded in the burgh register and the property title in the county register . . . . .            | Both.            |
| 11. Resignation <i>ad rem</i> . in the same case. . . . .  |                  |
| 12. Extract decree of irritancy of a feu in the same case. As to 11 and 12, it is thought the county register is sufficient, but it is better to record in . . . . . | Both.            |
| 13. Lease, or sub-lease, and transmissions, under the Registration of Leases Act, by a burgage owner or his lessee . . . . .   | Burgh.           |
| 14. The same by a burgage-feuar . . . . .  | County.          |

#### SECTION 6.—SEARCHES.

1093. Dependent upon these questions of recording is the matter of sasine searches. Instances are found in which the steps in the same progress have been recorded indifferently in the two registers—some in the one and others in the other. In those cases prudence suggests full searches in both registers. But apart from such irregular cases, as far more than the prescriptive period has now gone since 1874, a search in the burgh register is sufficient, feu or no feu. A difficulty in burgage searches is that the town clerks are not bound to furnish them. When they decline to do so, private searchers must be instructed, often at considerable inconvenience.

**1094.** There have never been any separate personal registers in connection with burgage property. The personal registers and searches are the same as if the property were a feu-holding.

**1095.** It will be observed that the rubric of s. 25 of the 1874 Act is, "Distinction between burgage and feu abolished." The language of the Act itself is somewhat contradictory, but there is certainly no *abolition* of burgage as a separate tenure, nor even of all differences between it and feu. It is true, however, that the only practical difference between burgage and modern feus is the existence of these separate burgh registers. It is much to be desired that they should be superseded. In the first place, there is often a doubt whether the property is or is not burgage. To get over such doubts it is not uncommon to record in both registers. The evils of that are obvious. It increases expense, and causes delay, which means risk. The same objection arises in every case in which a deed embraces both feu and burgage property. In that case there must be a double recording; and unless serious additional expense is to be incurred, there must be a considerable interval before a real right can be obtained to one or other of the properties. The difficulties and additional expense regarding searches have already been pointed out. On all these grounds—uniformity, safety, despatch, and economy—the abolition of the burgh registers—shortly expected—will be a useful reform.

#### SECTION 7.—BURGAGE TENURE IN ENGLAND.

**1096.** The term burgage was used to describe a similar tenure in England, and there, as here, one of its leading characteristics was freedom of alienation.<sup>1</sup>

#### SECTION 8.—BOOKING, TENURE OF.

**1097.** Booking is the tenure by which lands and buildings in the burgh of Paisley are held.<sup>2</sup> It is known only in that burgh, and is described in the conveyancing statutes as "the peculiar tenure of booking." In the Burgage Tenure Act, 1860 (s. 23), and the Titles to Land (Consolidation) Act, 1868 (s. 152), it is apparently assimilated in nature to burgage tenure, the tenure in other burghs being referred to as "ordinary burgage tenure." The common element, however, is rather the kind of property to which the tenure applies, than the characteristics of the tenure itself. Booking resembles burgage inasmuch as both apply to burgh property, but it differs from it in these important respects: (1) that the holding is expressly of the burgh, and not of the Crown; and (2) that casualties, if not discharged or commuted, are exacted both from heirs and from singular successors. The rate is a

<sup>1</sup> Pollock and Maitland, *History of English Law*, i. 276.

<sup>2</sup> See *Chalmers v. The Mags. of Paisley*, 1829, 7 S. 718; R. Bell on *Testing of Deeds*, 2nd ed., p. 794.

merk Scots per acre for heirs, and a merk Scots per rood for singular successors. There is a special register for the registration of the titles. It is kept in Paisley by the town clerk. It is known as the Register of Bookings, Reversions, etc.

**1098.** As regards completion of title, the cardinal difference between the disposition and a conveyance of burgage property was, that the obligation was not to infeft and seise, but "to book and secure." It is in accordance with this difference that there never was any ceremony of infeftment upon the ground of the property. Prior to 1860 the disposition was followed by an "act of booking" which took place at a council meeting and was recorded in the minutes. The disponer's procurator appeared and resigned the subjects in the hands of the council by delivery of staff and baton, which were delivered back to the attorney for the disponee, who took instrument and craved extract. The disponee received an extract from the minute which was known as an "extract booking." The ceremony always took place in face of the council and in the council chamber, while it was not until 1845 that the corresponding change was introduced in the case of burgage tenure. The procedure in the case of an heir's entry was similar. The heir or his attorney appeared before the council, produced the ancestor's infeftment and evidence of propinquity, if required, whereupon an act of booking was granted, instruments were taken in the hands of the town clerk, the procedure was engrossed in the minutes, and an extract booking was issued.

**1099.** The Burgage Tenure Act, 1860,<sup>1</sup> practically superseded the old procedure by allowing the disposition to be recorded, and by introducing writs of *clare constat* by the magistrates in favour of heirs.<sup>2</sup> A disposition of property held by this tenure need not now differ from an ordinary disposition. It is recorded in the register of bookings. It is frequently the case that the titles bear that the properties are held for payment to the magistrates of an annual sum termed a "duty."

**1100.** The seats in the three burgh churches, which were erected by the town council, were held by the tenure of booking, and the titles were made up in the form above mentioned.

**1101.** Section 25 of the Conveyancing Act, 1874, so far abolishes the distinction between feu and booking.<sup>3</sup>

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<sup>1</sup> 23 & 24 Vict. c. 143, ss. 3 and 22.

<sup>2</sup> *Ibid.*, ss. 7 and 23.

<sup>3</sup> See paras. 172 and 181, *supra*.

## BURGHES.

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## SECTION 1.—INTRODUCTORY.

SUBSECTION (1).—*Definition and Classification.*

**1102.** Burghs in Scotland are towns whose inhabitants have become incorporated either by Crown charter or under Act of Parliament for the purposes of civic government. Of the former class are royal burghs and burghs of regality and of barony; of the latter are parliamentary and police burghs. The chartered burghs were part of the feudal system, the royal burghs holding directly under the Crown in return for services of watching and warding;<sup>1</sup> but burghs of regality and of barony were erected by the Crown to be held under lords of regality and barons, according to the ordinary principles of feudal tenure.<sup>2</sup> The royal burghs derived their existence and constitution from their charters, but as early as the fifteenth century a constitution was established for them by Act of Parliament.<sup>3</sup> By a series of later statutes<sup>4</sup> the administration and elections in these burghs were placed

*Note.*—In these sections the following abbreviations are used :

“B.P. Act, 1892,” *i.e.* Burgh Police (Scotland) Act, 1892 (55 & 56 Vict. c. 55); “B.P. Act, 1893,” *i.e.* Burgh Police (Scotland) Act, 1893 (56 & 57 Vict. c. 25); “B.P. Act, 1903,” *i.e.* Burgh Police (Scotland) Act, 1903 (3 Edw. VII. c. 33); “T.C. Act, 1900,” *i.e.* Town Councils (Scotland) Act, 1900 (63 & 64 Vict. c. 49); “T.C. Act, 1903,” *i.e.* Town Councils (Scotland) Act, 1903 (3 Edw. VII. c. 34); “T.C. Act, 1923,” *i.e.* Town Councils (Scotland) Act, 1923 (13 & 14 Geo. V. c. 41); “L.G. Act, 1889,” *i.e.* Local Government (Scotland) Act, 1889.

GENERAL AUTHORITIES.—Stair, iv. 47, 19; More's *Notes*, clxxi.; Bankt. ii. 3, 71 *et seqq.*; Ersk. i. 4, 20–24; Bell, Prin. ss. 838 *et seq.*, 2161 *et seq.*; Campbell Irons, Burgh Police Act, 1892; Irons, Melville, and Mitchell, Burgh Government; Muirhead, Municipal and Police Government in Scotland; White, Local Government in Scotland; Kames, Statute Law (Abridged), Art. Burgh Royal.

<sup>1</sup> Bell, Prin. ss. 838, 2161.    <sup>2</sup> *Ibid.*, ss. 848, 849.    <sup>3</sup> 1424, c. 39; 1469, c. 30.

<sup>4</sup> See especially 3 & 4 Will. IV. cc. 76 & 77 (1833); and the statutes cited in the B.P. Act, 1892, Schedule I.; B.P. Act, 1892; T.C. Act, 1900.

under statutory conditions. Rights of property and many of the privileges both of the incorporations and of the inhabitants have been preserved to them.

**1103.** With the growth of the country many populous places sprang up which possessed no corporate civic organisation, and formed, for all purposes, parts of the counties in which they were situated. Provision was made to enable certain large towns to obtain parliamentary representation and to appoint town councils.<sup>1</sup> These towns became known as "parliamentary burghs." The Act 3 & 4 Will. IV. c. 77 provided that in thirteen burghs—viz. Paisley, Greenock, Perth, Kilmarnock, Falkirk, Hamilton, Peterhead, Musselburgh, Airdrie, Port-Glasgow, Cromarty, Portobello, and Oban, being burghs sending or contributing to send members to Parliament—magistrates and councillors should be appointed as provided in the Act, and conferred on them the same rights and powers as were possessed by the magistrates and councillors of royal burghs. In 1868 Hawick and Galashiels were added to the number of parliamentary burghs.

**1104.** Later public Acts, especially the General Police (Scotland) Act, 1862, and the B.P. Act, 1892, enabled populous places to be formed into police burghs, while these and many other Acts of Parliament extended a general system of police administration to all the burghs of Scotland, excepting Edinburgh, Glasgow, Aberdeen, Dundee, and Greenock, whose police administration rested on private Acts.<sup>2</sup> These cities may adopt the B.P. Act, 1892, in whole or part should they desire to do so. Coatbridge, speaking strictly, is neither a royal nor a parliamentary nor a police burgh. It is constituted a burgh by special Act, and it is provided by the B.P. Act, 1903,<sup>3</sup> that in every future Act a reference to a royal burgh shall include a reference to Coatbridge.

#### SUBSECTION (2).—*Election of Councillors and Magistrates.*

**1105.** A uniform system of election of councillors and magistrates under the T.C. Act, 1900,<sup>4</sup> now prevails in the Scottish burghs. The commissioners for police and for other purposes are now merged in the corporate body known as the "provost, magistrates, and councillors,"<sup>5</sup> whose numbers, however, remain unaffected by the last-mentioned Act, unless and until they have been altered under its provisions.<sup>6</sup>

#### SUBSECTION (3).—*Jurisdiction of Magistrates.*

**1106.** The magistrates of burghs act as a court of justice in the burgh police Court, having jurisdiction under the B.P. Acts. They also form the licensing Court in burghs with more than 7000 inhabitants, and

<sup>1</sup> 2 & 3 Will. IV. c. 65, and 3 & 4 Will. IV. c. 77.

<sup>2</sup> See the B.P. Act, 1892, which has repealed many of the earlier statutes, except in so far as they have been incorporated by reference in unrepealed local Acts. Bell, Prin. s. 2161 (*d*).

<sup>3</sup> Sec. 101.

<sup>4</sup> Sec. 41 *et seq.*

<sup>5</sup> *Ibid.*, ss. 5, 7, 8.

<sup>6</sup> *Ibid.*, ss. 10, 11.

in burghs with more than 4000 inhabitants at the date of the Licensing (Scotland) Act, 1903, which had a licensing Court at that date. In burghs having a population of 20,000 or over, the licensing Court and an equal number of justices of the peace for the county in which the burgh is situated form the appeal Court. In burghs with a population of from 7000 to 20,000, the appeal Court consists of the burgh magistrates and justices of the peace to the same number, as specified in the Licensing (Scotland) Act, 1903. The town council or a committee of the council (Burgh Valuation Committee) sits as a valuation appeal Court in appeals against valuations of lands and heritages within the burgh; where no dean of guild Court exists in a burgh, the functions of the dean of guild Court under the B.P. Acts are performed by the town council, but the town council cannot sit as a Court to try guild offences.<sup>1</sup> Dean of guild Courts may be established under the B.P. Act, 1892.<sup>2</sup>

#### SUBSECTION (4).—*Administrative Duties.*

**1107.** Practically all local administration, with the exception of poor law, lunacy, and education administration, is in the hands of the town council. Thus they have the management, as local authority or through magistrates, of roads, streets, and bridges in the burgh; of sewerage and drainage, removal of refuse, lighting and cleaning, water supply, construction of buildings. They are the local authority under Acts relating to Public Health, Housing, Diseases of Animals, Sale of Food and Drugs, Public Libraries, Smoke Nuisance, Rivers Pollution, Factories and Workshops, Shop Hours Regulation, Infectious Diseases, Gas Supply and Electric Lighting. In royal and parliamentary burghs with populations under 7000 inhabitants, the county council administers the Acts relating to the Police Force and the Diseases of Animals. In police burghs the county council has charge of valuation for rating and taxation, and the registration of voters.

### SECTION 2.—ROYAL BURGHES.

#### SUBSECTION (1).—*Constitution.*

**1108.** A royal burgh is a corporate body of burgesses erected by a charter from the Crown and holding its lands and privileges direct from the Crown. Most of the original charters have been lost, but numerous charters of confirmation of earlier charters were granted; and sometimes the existence of a charter has had to be inferred from external evidence.<sup>3</sup> The charter does not require or possibly even admit of sasine, and the fee is always full. The corporation consists of the persons in whose favour the charter is granted, being generally the magistrates and burgesses or residents within the territory or royalty defined by the charter, but the grants vary in their terms, e.g. "to the

<sup>1</sup> B.P. Act, 1903, s. 42.

<sup>2</sup> Sec. 202.

<sup>3</sup> *Magistrates of Sanquhar v. Officers of State*, 1864, 2 M. 499.



merchants burgesses and community," or "to the burgesses together with the provost, bailies, and incorporations." The charter of Glasgow in 1690 confirms all former charters granted "*communitati vel Gildae mechanicis ac singulis societatibus et Diaconis ejusdem*," and then the charter is granted *de novo* "*Civitati et Concilio Burgali*." The royal burghs were invested almost invariably by their charters with power to choose annually such office-bearers or magistrates as were specified in the grant, being generally a provost, bailies, dean of guild, and treasurer, with a common council, but there is no instance of a clause of election being introduced into any charter before 1469.

#### SUBSECTION (2).—*Election of Office-bearers.*

**1109.** The manner of election was long regulated by the statute 1469, c. 30; but nearly every burgh had a set or constitution proper to itself, which often contained special provisions according to which the magistrates or council were elected. The right of appointing their successors was vested in existing councils by the statute 1469, c. 5, which provided that when the new council was chosen, the members thereof, along with the old council, should choose the office-bearers of the town, and that each craft should choose a member thereof, to have a voice in the election of office-bearers. In this matter, also, the sets of the burghs varied in many points of detail, but agreed generally in the principle of self-election. This retrograde and unsatisfactory state of matters was altered by the Act 3 & 4 Will. IV. c. 76, whereby the popular system was introduced of giving to all male residents within the burgh or seven miles thereof the right of voting in the election, provided they possessed the necessary qualifications. That Act has been repealed by the T.C. Act, 1900, which now regulates municipal elections in burghs.

#### SUBSECTION (3).—*Powers.*

**1110.** Being corporations, royal burghs are possessed of wide powers and are subject to the general law of corporations. They can acquire and hold property both heritable and moveable, and dispose of it freely, with the exception of such subjects as are in their nature inalienable by the burgh.<sup>1</sup> They have the usual powers possessed by common law corporations of making by-laws.<sup>2</sup>

The magistrates of many royal burghs had power under their charters, as delegates from the Crown, to constitute crafts or manufacturing corporations within burgh, and to prescribe their powers and privileges. The grant was known as a "seal of cause."<sup>3</sup> Although their exclusive privileges of trading within burgh have been abolished, the guilds and corporations still exist, and have power to elect their own deacons and office-bearers.

<sup>1</sup> See para. 1250 *et seqq.*, "Common Good."

<sup>2</sup> See *sub voce* "BY-LAW."

<sup>3</sup> Bell's Dict., "Seal of Cause"; Bell, Prin. s. 2183; Ersk. i. 7, 64; *Crooks v. Turnbull*, 1776, Mor. 2007; *Mowat v. Tailors of Aberdeen*, 1825, 4 S. 52 (N.E. 53).



SUBSECTION (4).—*Administration.*

**1111.** The administration of royal burghs is now carried on mainly under the B.P. Act, 1892, and amending Acts, which apply to all burghs not expressly excluded from their provisions. Specialties relating to royal burghs will be sufficiently noted in the succeeding paragraphs. Many enactments were in force regulating trade in royal burghs and defining the privileges of magistrates and burgesses, but most of them have fallen into desuetude or have been repealed.<sup>1</sup> There are sixty-six royal burghs in Scotland.

## SECTION 3.—BURGHES OF BARONY AND REGALITY.

**1112.** A burgh of barony or a burgh of regality is a corporation consisting of the inhabitants of a determinate tract of territory within the barony or regality, erected by the Crown to be held of lords of regality or barons, and subject to the government of magistrates.

**1113.** Such burghs were sometimes erected with a constitution and jurisdiction in the magistrates and community, independently of the superior. Sometimes they were made dependent on the superior for their set. But this dependence was abolished by 20 Geo. II. c. 50.<sup>2</sup> Burghs of barony and regality had privileges of trade and manufacture within the burgh, and sometimes possessed power to erect corporations in the various crafts in the manner exercised by the royal burghs. Exclusive privileges in trading were abolished by the Act 9 & 10 Vict. c. 17. The general law applicable to corporations applies to these burghs. They administer their common good and appoint officers and magistrates. In cases where the magistracy was dependent on the superior his jurisdiction was abolished by the Heritable Jurisdictions (Scotland) Act, 1746;<sup>3</sup> where independent of the superior it was preserved.<sup>4</sup>

**1114.** The right of electing magistrates was vested by the charter sometimes in the inhabitants themselves, and sometimes in the baron, their superior. Where such burghs were not parliamentary burghs, the list or register of persons entitled to vote in the election of councillors, where these were not nominated by the superior, was made up in the manner prescribed by the charter or the statute by which such burgh had been erected, or under which its affairs were administered. Where the charter or statute did not contain such directions, the election was, as far as practicable, conducted in terms of the provisions regulating the election of councillors for royal burghs. The whole provisions of the T.C. Act, 1900, apply to such burghs and now regulate all matters regarding elections,<sup>5</sup> but the number of magistrates and councillors remains the same as formerly, unless and until it has been altered in terms of that Act.<sup>6</sup>

<sup>1</sup> See 24 Geo. II. c. 31, s. 23; 9 & 10 Vict. c. 17.

<sup>2</sup> Bell, Prin. s. 848.

<sup>3</sup> 20 Geo. II. c. 43, s. 1.

<sup>5</sup> T.C. Act, 1900, s. 4 (3); B.P. Act, 1892, s. 4 (4).

<sup>4</sup> *Ibid.*, s. 27.

<sup>6</sup> Sec. 10.

## SECTION 4.—PARLIAMENTARY BURGHs.

**1115.** Reference has already been made<sup>1</sup> to the establishment of parliamentary representation and the creation of town councils in certain burghs by the provisions of the Acts 2 & 3 Will. IV. c. 65 and 3 & 4 Will. IV. c. 77. The burghs thus enfranchised became known as “parliamentary burghs.” Under the later Act a certain number of councillors was appointed to be chosen for each burgh; for some 16, for others 12, for others 9, and for Oban 6. Though this statute is now repealed,<sup>2</sup> this provision is still operative, as by that Act it is provided that the number of magistrates and councillors to be elected in each burgh shall, unless and until altered under that Act, remain the same as under the existing law.<sup>3</sup> A scale of the number of magistrates and councillors, with reference to population, is fixed by Schedule II. to the T.C. Act, 1900, and where the numbers differ from that scale according to the existing law, or come to differ afterwards by alteration of population, the town council may apply to the sheriff to have their numbers increased or diminished, so as to make them conform to the scale specified in the schedule.<sup>4</sup>

## SECTION 5.—POLICE BURGHs.

SUBSECTION (1).—*Application to Sheriff for Formation.*

**1116.** Populous places which have been formed into burghs under the Police or Local Acts are popularly known and are described in the statutes as police burghs. Many of these burghs were formed under the provisions of the General Police (Scotland) Act, 1862, which was repealed by the B.P. Act, 1892, under which Act (as amended by subsequent legislation) police burghs are now formed. Where there is a “populous place” (which is defined by the Act of 1892<sup>5</sup> as meaning “any town, village, place, or locality containing a population of 700 inhabitants or upwards, not being administered under any General or Local Police Act; and for the purposes of this Act, two or more contiguous towns, villages, places, or localities, not being burghs, may be held to be a populous place”), its boundaries shall, when it is intended to form it into a police burgh, be fixed by the sheriff or sheriffs of the county or counties where such place is situated, on the application of any seven or more householders in such populous place, on proper application being made to such sheriff or sheriffs. “Householder” is, for this purpose, any occupier of lands or premises whose occupancy qualifies him to vote for a Member of Parliament for a burgh, and includes any female occupier who is entitled to vote at municipal elections.<sup>6</sup>

<sup>1</sup> Para. 1103, *supra*.

<sup>3</sup> Sec. 10.

<sup>5</sup> B.P. Act, 1892, s. 4 (26).

<sup>2</sup> T.C. Act, 1900, Schedule I.

<sup>4</sup> Sec. 11.

<sup>6</sup> *Ibid.*, s. 4 (14).

1117. When the application is presented, the sheriff directs notice of it to be given by advertisement for two successive weeks in the Edinburgh Gazette, and in some newspaper published or circulating in the county or counties in which such populous place is situated, appoints a day for hearing parties interested, and appoints and directs a proper person to ascertain and report the amount of the population of the populous place. The sheriff then hears interested parties, and determines whether the area included in the application, or any part thereof, considering the number of the dwelling-houses within it, the density of the population, and all the circumstances of the case, is in substance a town, and is suitable for being formed into a police burgh. If the sheriff or sheriffs are satisfied on these points, a written deliverance is pronounced on the application, defining the boundaries of such populous place and, where necessary, the limits of the wards. In defining the boundaries of a populous place, it is lawful for the sheriff to include the whole area which in his judgment properly belongs to and forms part of the same town, with a reasonable margin for extension, if he thinks proper, but so as not to encroach on the boundaries of any other burgh or of any other county, unless the sheriff of such county concurs in the deliverance.<sup>1</sup> In defining the boundaries of a populous place, it is not proper to include an area merely in respect that it is within the water and drainage districts already formed for the neighbourhood, and with a view to these districts being within the sole control of the burgh.<sup>2</sup>

SUBSECTION (2).—*Meeting of Householdors.*

1118. In the Act of 1892, no provision was made for holding a meeting and taking a poll, as provided by the 1862 Act; but by the B.P. Act, 1893, this was remedied, and it is provided<sup>3</sup> that where the boundaries of a populous place have been defined, the sheriff, on the requisition of any seven or more householders, accompanied, if the sheriff requires, by a satisfactory undertaking to pay expenses, convenes a meeting of the householders for the purpose of considering whether the provisions of the 1892 Act shall be adopted and carried into execution, and the populous place declared to be a burgh. The meeting is to be held not less than twenty-one, nor more than thirty, days after the date on which the sheriff receives the requisition; and the meeting and the purposes thereof must be duly advertised in a newspaper circulating in the populous place, and by posting handbills in the form of a schedule annexed to the amending Act. The meeting must be held in a convenient place fixed by the sheriff, who attends and presides, and a clerk is appointed by him to take notes of the proceedings. The meeting determines whether the Act shall be adopted, or may appoint a committee of its number, not exceeding nine, to inquire and report to a future meeting.

<sup>1</sup> Sec. 9 (1).

<sup>2</sup> *Glenarnock Iron and Steel Co. v. M'Gregor*; *Cunningham v. M'Gregor*, 1904, 6 F. 955.

<sup>3</sup> B.P. Act, 1893, s. 2 (1).



The sheriff ascertains the determination of the meeting by a shew of hands, or in such other manner as he thinks proper; and in the case of equality of votes he has a casting vote. The determination of the meeting is final, unless a poll of householders is then demanded in writing by seven persons present and qualified to vote.

#### SUBSECTION (3).—*Poll.*

**1119.** If a poll be demanded, the sheriff directs it to proceed at such polling-places and on such dates as he fixes, not more than seven days from the date of the demand, between the hours of 8 A.M. and 8 P.M. The sheriff acts as returning officer, and appoints a presiding officer and polling clerks, and poll or ballot books are prepared in the form of the schedule annexed to the Act. The voting is by ballot, subject to regulations issued by the Secretary for Scotland. After the close of the poll the ballot-boxes are sealed up and transmitted to the sheriff, who declares the result at an adjourned meeting. The declaration is final, unless any householder at the meeting demand a scrutiny, which may be given by the sheriff on caution being found for expenses. The resolution to adopt the provisions of the Act is effectual if carried by a majority of the persons qualified and voting; and the sheriff finds and declares either that the Act has or has not been adopted; and if it be adopted, he shall declare that such populous place is a burgh, which declaration is recorded in the Sheriff Court books of the county, and reported to the Secretary for Scotland.

#### SUBSECTION (4).—*Appeal.*

**1120.** Any owner or occupier within the boundaries fixed by the sheriff who considers himself aggrieved by the deliverance or the resolutions, or the county council, or the standing joint committee of any county into which the boundaries extend beyond the existing boundaries, may within fourteen days from the date of the deliverance present a petition against the same to the Court of Session, setting forth the grounds on which they object to the deliverance. After answers have been lodged, the Court may either pronounce a final order or remit to a Lord Ordinary to direct inquiry, and to issue such order as he may deem requisite to determine the boundaries of such burgh; and such order shall, in either case, be final, and when recorded in the Sheriff Court books of the county, fixes the boundaries of the burgh for the purposes of the Act.<sup>1</sup>

#### SUBSECTION (5).—*Transfer of Property on Adoption of B.P. Acts.*

**1121.** Where a burgh erected by charter has adopted the B.P. Acts and been formed into a police burgh, the property of the burgh is transferred (1) to the police commissioners under the Act of 1862 as at the

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<sup>1</sup> B.P. Act, 1892, s. 13.



date when that Act was adopted; (2) from the commissioners under the Act of 1862 to the commissioners under the B.P. Act, 1892, on the passing of the latter Act; and (3) from the commissioners under the Act of 1892 to them as the town council constituted by the T.C. Act, 1900.<sup>1</sup> The charters and the town council under them are superseded by the B.P. Act, 1892, or by the T.C. Act, 1900, and it is no longer competent to elect any town council under the charters of erection or otherwise than in accordance with the T.C. Act, 1900.<sup>1</sup>

#### SUBSECTION (6).—*Expenses of Adoption.*

**1122.** If the Acts are adopted, the expenses are defrayed from the burgh general assessment; if they are not adopted, the whole expenses fall to be paid by the persons signing the application to the sheriff, and the party who has disbursed these expenses may recover them in a summary way before the sheriff, whose determination is final.<sup>2</sup>

#### SECTION 6.—REVISION OF BOUNDARIES.

##### SUBSECTION (1).—*Procedure.*

**1123.** Where it is desired to revise, alter, extend, or contract the boundaries of a burgh, application may be made to the sheriff by the town council. After appropriate advertisement and upon such notice and inquiry as he may deem necessary, and after hearing all parties interested, the sheriff may grant a written deliverance defining the new boundaries of such burgh. His deliverance is final unless appealed against in the manner prescribed by the B.P. Act, 1892,<sup>3</sup> and is recorded in the Sheriff Court books of the county. The new boundaries must not encroach on the boundaries of any other burgh. Where the burgh and the lands proposed to be included in any application for an extension of boundary lie in more than one county, the application is made to and disposed of by the sheriffs of all the counties concerned.

**1124.** The sheriff or sheriffs, in revising the boundaries, must take into consideration the number of dwelling-houses within the area proposed to be included, the density of the population, and all the circumstances of the case, "whether it properly belongs to and ought to form part of the burgh," and should in their judgment be included therein.<sup>4</sup> The boundary cannot be extended so as to include a new district unless it be shewn (1) that the town has grown beyond the burgh boundary into the district,<sup>5</sup> and (2) that rural government and administration are no longer appropriate to the district.<sup>6</sup> It is not essential that the whole area added should be already covered with buildings if it is in

<sup>1</sup> *Blairgowrie Comrs.*, 1901, 4 F. 72; *Leslie Mags. v. Archibald*, 1904, 41 S.L.R. 482; 11 S.L.T. 760.

<sup>2</sup> B.P. Act, 1893, s. 3.

<sup>3</sup> Sec. 13.

<sup>4</sup> *Ibid.*, s. 11, as amended by the T.C. Act, 1900, Schedule I.

<sup>5</sup> *Lanarkshire C.C. v. Corp'n. of Motherwell*, 1904, 6 F. 962.

<sup>6</sup> *County Council of Dumbartonshire v. Clydebank Burgh Comrs.*, 1901, 4 F. 111.

the course of being built upon and is suitable for burghal administration. Nor is it a valid objection to the inclusion of the area that the county authority will be deprived of a valuable area of assessment.<sup>1</sup> The number of houses in the area sought to be annexed is the leading consideration,<sup>2</sup> and the wishes of the inhabitants of that area must also be considered.<sup>3</sup> The sheriff must consider all reasonable objections.<sup>4</sup> The boundaries may be extended seawards so as to include part of a pier built below low-water mark.<sup>5</sup>

1125. In these proceedings the functions of the sheriff are of an administrative rather than a judicial character, and he must satisfy himself that the revision is expedient. The fact that there is no opposition is only an element to be weighed in coming to a determination.<sup>6</sup> Every alteration of the boundary of a burgh under s. 11 or s. 12 of the B.P. Act, 1892, must be forthwith intimated by the town clerk to the Secretary for Scotland.<sup>7</sup> Similar procedure is also provided<sup>8</sup> for the extension of municipal boundaries to police boundaries, and police boundaries to municipal or parliamentary boundaries. "Municipal boundary" is defined to be (a) in the case of a royal burgh, parliamentary burgh, or burgh incorporated by Act of Parliament, the existing boundary for the purpose of voting for town councillors; (b) in the case of any other burgh, the boundary of the burgh as fixed under the provisions of the B.P. Act, 1892, or of any Act thereby repealed; and (c) in all cases shall include any extension of such boundary, and be subject to any contraction thereof effected under any Act.<sup>9</sup> The municipal boundary in royal burghs includes the whole royalty whether within or without the parliamentary boundaries.<sup>10</sup>

1126. Burgh boundaries may also be extended or contracted under the Boundaries of Burghs Extension (Scotland) Act, 1857,<sup>11</sup> but the procedure under this Act is not likely to be adopted now.

#### SUBSECTION (2).—*Adjustment of Property and Liabilities.*

1127. The provisions of s. 50 of the L.G. Act, 1889, relating to the adjustment of property and liabilities consequent on an alteration of boundaries, are made applicable on the formation of any new burgh or extension of the boundaries of any existing burgh.<sup>12</sup> By that section,

<sup>1</sup> *County Council of Lanarkshire v. Govan Burgh Comrs.*, 1902, 4 F. 479.

<sup>2</sup> *Glengarnock Iron and Steel Co. v. M'Gregor*, 1904, 6 F. 955; *Lanarkshire C.C. v. Motherwell Corpn.*, 1904, 6 F. 962.

<sup>3</sup> *Dumbartonshire C.C. v. Comrs. of Clydebank*, 1901, 4 F. 111.

<sup>4</sup> *White v. Mags. of Rutherglen*, 1897, 24 R. 446.

<sup>5</sup> *Dunoon Comrs. v. Hunter's Trs.*, 1895, 22 R. 379. See also *Leith Dock Comrs. v. Mags. of Leith*, 1911 S.C. 1139, and *Christie v. Mags. of Leven*, 1912 S.C. 678, as to boundaries by "high-water mark" and "low-water mark."

<sup>6</sup> *Lindsay v. Mags. of Leith*, 1897, 24 R. 867. <sup>7</sup> B.P. Act, 1903, s. 104 (2a).

<sup>8</sup> B.P. Act, 1892, s. 12, as amended by the B.P. Act, 1903, s. 104 (2a).

<sup>9</sup> T.C. Act, 1900, s. 4 (11); and see the L.G. Act, 1889, s. 44 (b).

<sup>10</sup> *Lower Ward of Lanark District Committee v. Rutherglen Mags.*, 1902, 4 F. (H.L.) 35.

<sup>11</sup> 20 & 21 Vict. c. 70.

<sup>12</sup> B.P. Act, 1903, s. 96.

as applied by s. 96 of the B.P. Act, 1903, when a new burgh is formed or the boundaries of a burgh extended by taking in an area from a county for the adjustment of any property and liabilities, the adjustment may be determined by the sheriff (not being a sheriff-substitute) as arbiter. The mere loss to the county of a part of an area valuable for future assessment will not support a claim for adjustment of liabilities.<sup>1</sup> "The property debts or liabilities to be retained or transferred must mean existing property or debts or a liability actually incurred."<sup>2</sup> "Liability" "does not mean a liability which in one sense may be said to be present because it is presently existing, but in another sense is really a future liability"; *e.g.* liability to maintain roads.<sup>3</sup> The expectancy of profits from a tramway line authorised to be, but not yet, made is not "property" for which a claim will lie.<sup>4</sup> Loans secured on the rates of the district of which the extended area forms a part are a proper subject for adjustment.<sup>5</sup> When the administration of an older burgh passes to a new burgh, the property of the old burgh passes likewise, but only for the use of ratepayers and burgesses within the area of the old burgh.<sup>6</sup> In petitions against the deliverances of sheriffs in proceedings for revising boundaries the Court has power to award expenses.<sup>7</sup>

**1128.** Where it is the duty of two or more sheriffs to fix the boundary and they fail to agree, they must state a case for the Court of Session.<sup>8</sup> The statutory provisions as to fixing boundaries are deemed to have been complied with unless they have been challenged in a competent court of law within three years from the date of non-compliance with the statutory requirements.<sup>9</sup>

#### SECTION 7.—DIVISION INTO WARDS AND POLLING DISTRICTS.

**1129.** For convenience in elections the larger burghs are divided into wards. Where the division is made under the provisions of the T.C. Act, 1900, the number of wards must be so adjusted as that there shall be three, or a multiple of three, councillors for each ward.<sup>10</sup> In the case of any burgh where the number of wards and the number of councillors for each ward under the existing law differ from that proportion, the number of wards and councillors remains as hitherto, notwithstanding the provisions of that Act, until altered under s. 19

<sup>1</sup> *Caterham Urban Council v. Godstone Rural Council*, [1904] A.C. 171; *Midlothian C.C. v. Mags. of Musselburgh*, 1911 S.C. 463; *Inverness C.C. v. Inverness Burgh*, 1909 S.C. 336.

<sup>2</sup> Per L. Davey in *Caterham*, *supra*.

<sup>3</sup> Per L.P. Dunedin in *Midlothian C.C.*, *supra*, at p. 472, as to what may be included under "liabilities," and as to the form of the application to the sheriff.

<sup>4</sup> *Lanarkshire C.C. v. Mags. of Motherwell*, 1912 S.C. 1251.

<sup>5</sup> *Midlothian C.C.*, *supra*.

<sup>6</sup> *Blairgowrie Comrs.*, 1901, 4 F. 72; *Leslie Mags. v. Archibald*, 1904, 41 S.L.R. 482; 11 S.L.T. 760; *Russell v. Mags. of Hamilton*, 1897, 25 R. 350.

<sup>7</sup> *Dumbartonshire C.C. v. Clydebank Burgh Comrs.*, 1901, 4 F. 111 (expenses allowed); *White v. Mags. of Rutherglen*, 1897, 24 R. 446 (expenses refused).

<sup>8</sup> B.P. Act, 1892, s. 13.

<sup>9</sup> *Ibid.*, s. 18.

<sup>10</sup> T.C. Act, 1900, s. 17.



thereof.<sup>1</sup> Where the town council of a burgh not divided into wards resolves that it is expedient that it should be so divided, or where it resolves that it is expedient that the number or boundaries of the wards should be altered; or where, in consequence of any increase or decrease of councillors, it is necessary, in order to conform with the number of magistrates and councillors set forth in the scale provided by the T.C. Act, 1900;<sup>2</sup> or where any alteration of the boundary of a burgh has taken place, the sheriff must, on the application of the town council, if he considers the change necessary or expedient, and after inquiry and advertisement, and after hearing all parties interested, (1) divide or redivide the whole burgh into wards in conformity with s. 17 of that Act, or as near as possible thereto, and define the boundaries of such wards; (2) in every case, except in that of a burgh for the first time divided into wards, apportion the existing councillors, or any increased or decreased number of councillors, among the wards so created or altered; and (3) determine all questions arising in connection with such alteration or division.<sup>3</sup> The provisions of s. 19 do not apply to the burghs named in Schedule II. of the B.P. Act, 1892.<sup>3</sup>

**1130.** The sheriff, in dividing a burgh into wards, or in altering the number or boundaries of wards, must have regard to the number of electors and the value of the lands and heritages in each ward, and must not finally make such division or alteration until the proposed division or alteration has been advertised and objectors allowed to be heard.<sup>4</sup> Any division into wards or alteration of ward boundaries made under the T.C. Act, 1900, has effect for parliamentary as well as for municipal purposes, but not so as to affect the boundaries of any division of the burgh for the purpose of returning a member to serve for such division in Parliament.<sup>5</sup>

**1131.** In the case of a burgh for the first time divided into wards under the provisions of the T.C. Act, 1900, the whole of the council, including the provost, must retire at the next-election after the division is completed, and the new council will be elected by the wards.<sup>6</sup> The town council may by resolution divide the burgh, or any ward, into two or more polling districts, and from time to time rescind such resolution, or alter the number or boundaries of such polling districts; and in carrying out any election the returning officer must appoint at least one polling station for each polling district,<sup>7</sup> but it is not necessary that any polling station should be situated within such polling district.<sup>8</sup>

## SECTION 8.—QUALIFICATION OF ELECTORS.

### SUBSECTION (1).—*General.*

**1132.** The provisions of s. 23 of the T.C. Act, 1900, relating to the qualification of electors have been almost wholly swept away by the

<sup>1</sup> T.C. Act, 1900, s. 18.

<sup>3</sup> Sec. 19.

<sup>6</sup> *Ibid.*, s. 21.

<sup>4</sup> T.C. Act, 1900, s. 19.

<sup>7</sup> *Ibid.*, s. 22.

<sup>2</sup> *Ibid.*, ss. 10, 17, and Schedule II.

<sup>5</sup> *Ibid.*, s. 20.

<sup>8</sup> T.C. Act, 1923, s. 5.



Representation of the People Act, 1918.<sup>1</sup> Subs. 1 remains, as altered by Schedule VI. of the Act of 1918, and is in the following terms: "The electors consist of all persons who are registered as local government electors for the burgh in accordance with the provisions of the Representation of the People Act, 1918."

SUBSECTION (2).—*Men's Franchise.*

**1133.** The Act of 1918 establishes both a parliamentary and a local government franchise. In the application of this Act to Scotland it is provided—<sup>2</sup>

(a) A man who is of full age, and not subject to any legal incapacity, shall be entitled to be registered as a local government elector for a local government electoral area,<sup>3</sup> if he is on the last day of the qualifying period and has been during the whole of that period—

- (i) the owner of lands and heritages within the area of the yearly value of not less than ten pounds: Where such lands and heritages are in the joint ownership of two or more persons and the aggregate yearly value of the lands and heritages is not less than the amount produced by multiplying ten pounds by the number of joint owners, each of the joint owners shall be treated as owning lands and heritages of the yearly value of not less than ten pounds; or
- (ii) the occupier as tenant of lands and heritages within the area of the yearly value of not less than ten pounds: Where such lands and heritages are in the joint occupation as tenants of two or more persons, and the aggregate yearly value of the lands and heritages is not less than the amount produced by multiplying ten pounds by the number of joint occupiers, each of the joint occupiers shall be treated as occupying lands and heritages of the yearly value of not less than ten pounds; or
- (iii) the inhabitant occupier or tenant of a dwelling-house within the area; or
- (iv) the occupier of lodgings within the area of the yearly value if let unfurnished of not less than ten pounds: Where such lodgings are in the joint occupation of not more than two persons and the aggregate yearly value as aforesaid of the lodgings is not less than twenty pounds, each of the joint lodgers shall be treated as occupying lodgings of the yearly value of not less than ten pounds; or

<sup>1</sup> 7 & 8 Geo. V. c. 64. Under Schedule VIII., s. 23 of the T.C. Act, 1900, is repealed from the words "all persons who would have been entitled" to the end of the section, and ss. 24 to 32 are also repealed. Sec. 43 applies the Act to Scotland subject to certain modifications, and certain special adaptations will be found in Schedule VI. of the Act.

<sup>2</sup> Sec. 43 (3a).

<sup>3</sup> "Local government electoral area" means the area for which, *inter alia*, a town council is elected. 1918 Act, s. 43 (1).

(v) the inhabitant occupier by virtue of any office, service, or employment of a dwelling-house within the area which is not inhabited by the person in whose service he is in such office, service, or employment:

(b) The ownership or occupation in immediate succession of different lands and heritages, dwelling-houses, or lodgings, as the case may be, in the same parliamentary county or in the same parliamentary burgh, shall have the like effect in qualifying a man to be registered as a local government elector for a local government electoral area therein respectively, as the continued ownership or occupation of the same lands and heritages, dwelling-houses, or lodgings within that area:

(c) In this section "owner" shall include heir of entail in possession, liferenter and beneficiary entitled under any trust to the rents and profits of lands and heritages and shall not include the fiar of lands and heritages subject to a liferent, nor tutor, curator, judicial factor, nor commissioner; "lands and heritages" has the same meaning as in the Valuation Acts, and "dwelling-house" means any house or part of a house occupied as a separate dwelling.<sup>1</sup>

#### SUBSECTION (3).—*Women's Franchise.*

**1134.** A woman shall be entitled to be registered as a local government elector for any local government electoral area—

(a) Where she would be entitled to be so registered if she were a man; and

(b) where she is the wife of a man who is entitled to be so registered in respect of premises in which they both reside, and she has attained the age of thirty years and is not subject to any legal incapacity.<sup>2</sup>

"A woman, though she or her husband may have been occupying land or premises in the constituency on the last day of the qualifying period, shall not be entitled to be so registered, if she or her husband, as the case may be, commenced to occupy the land or premises within thirty days before the end of the qualifying period and ceased to occupy them within thirty days after the commencement of such occupation."<sup>3</sup>

#### SUBSECTION (4).—*Definitions.*

**1135.** "Tenant" includes a person who inhabits by virtue of any office, service, or employment any dwelling-house which is not inhabited by the person in whose service he or she is in such office, service, or employment; and also includes a person who occupies a room or rooms as a lodger only where such room or rooms are let to him or her in an unfurnished state. The expression "land or premises" means any land or premises (other than a dwelling-house) of the yearly value of

<sup>1</sup> 7 & 8 Geo. V. c. 64, s. 43.

<sup>2</sup> *Ibid.*, s. 4 (3).

<sup>3</sup> *Ibid.*, s. 43 (4), which substitutes a new subsection in place of s. 4 (1) in the application of the Act to Scotland.

not less than five pounds, or any dwelling-house. The word "county" means a county inclusive of all burghs therein except a county of a city; and the word "dwelling-house" means any house or part of a house occupied as a separate dwelling.<sup>1</sup>

SUBSECTION (5).—*Qualifying Period.*

**1136.** The qualifying period was formerly six months, ending either on the fifteenth day of January or the fifteenth day of July, including in each case the fifteenth day.<sup>2</sup> It is now three months.<sup>3</sup>

SECTION 9.—REGISTRATION OF VOTERS.

**1137.** Two registers of electors are prepared in each year, the spring register for the qualifying period ending on 15th January, and the autumn register for the period ending on 15th July.<sup>4</sup> The former comes into force on 15th April and remains in force till 15th October, and the latter comes into force on the commencement of 15th October and remains in force till 15th April.<sup>5</sup> If for any reason the registration officer fails to compile a fresh spring or autumn register for his area or any part of his area, the register in force at the time when the fresh register should have come into force shall continue to operate as the register for the area or part of the area in respect of which default has been made.<sup>6</sup> After October 1926 only an annual register is to be made up, on 15th October.<sup>3</sup> Each parliamentary burgh and each parliamentary county is a registration area, and there is a registration officer for each registration area.<sup>7</sup> Fuller details as to registration, appeals from the decisions of the registration officer, and other matters relating to registration will be found in the Representation of the People Act, 1918.<sup>8</sup> See ELECTION LAW.

SECTION 10.—QUALIFICATION OF COUNCILLOR.

**1138.** The Women (County and Town Councils) (Scotland) Act, 1907,<sup>9</sup> provides that a woman shall not be disqualified by sex or marriage for being elected or being a councillor of the council of any county or burgh in Scotland.<sup>10</sup> The County, Town, and Parish Councils (Qualification) (Scotland) Act, 1914,<sup>11</sup> provides that any person of either sex, of full age, and not subject to any legal incapacity, shall be qualified to be elected a councillor of the council of any county, burgh, or parish in Scotland, if that person has resided within such county, burgh, or parish during the whole of the twelve months preceding the election.

<sup>1</sup> 7 & 8 Geo. V. c. 64, s. 43 (4).

<sup>2</sup> *Ibid.*, s. 6.

<sup>3</sup> 16 & 17 Geo. V. c. 9, s. 9.

<sup>4</sup> 7 & 8 Geo. V. c. 64, s. 11 (1).

<sup>5</sup> *Ibid.*, s. 11 (2).

<sup>6</sup> *Ibid.*, s. 11 (3).

<sup>7</sup> *Ibid.*, s. 12.

<sup>8</sup> Secs. 11 to 19.

<sup>9</sup> 7 Edw. VII. c. 48, amended by Sex Disqualification (Removal) Act, 1919 (9 & 10 Geo. V. c. 71), Schedule.

<sup>10</sup> *Ibid.*, s. 1.

<sup>11</sup> 4 & 5 Geo. V. c. 39, s. 1, and see T.C. Act, 1900, s. 12, as amended by 7 Edw. VII. c. 48, s. 1 (2).

## SECTION 11.—PROCEDURE AT ELECTIONS.

SUBSECTION (1).—*Mode of Election and Voting.*

**1139.** Where a burgh is not divided into wards, one election of councillors is held for the whole burgh. In other cases there is an election in each ward. Where the name of an elector appears in the municipal register as being qualified in respect of premises in more than one ward, such elector may vote in any one of said wards, but he is not entitled to vote at the same election in any other ward; and in the event of his doing so, or presenting himself at any polling-place and asking for and receiving a ballot paper with the intention of voting, he is liable to a penalty under the Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890.<sup>1</sup>

SUBSECTION (2).—*Notice of Vacancies and Dates of Nomination and Election.*

**1140.** On any day between 11th and 18th October in each year the town clerk must, by notice to be affixed on the outside wall of the town hall or ordinary meeting-place of the council, and also to be published either by handbills posted up throughout the burgh, or by insertion at least once during the said period in some newspaper or newspapers published within the burgh, if any be, or otherwise in some newspaper or newspapers circulating in the burgh, intimate (1) the names of the councillors falling to retire on the ensuing first Tuesday of November; (2) the wards by which their places fall to be supplied; (3) the date and place for lodging and withdrawing nomination papers; (4) the date of election in the event of there being a poll; and (5) the polling-places.<sup>2</sup> Forms are provided in Schedule III. of the T.C. Act, 1900.

SUBSECTION (3).—*Nomination of Candidates.*

**1141.** A person cannot be elected to the office of councillor unless his name has been intimated to the town clerk, as afterwards provided, before 4 P.M. of the Friday<sup>3</sup> immediately preceding the first Tuesday of November by delivery to him, or at his office, of a nomination paper in, or as nearly as may be in, the form of Schedule IV. of the T.C. Act, 1900.<sup>4</sup> By the T.C. Act, 1903,<sup>5</sup> it is declared incompetent to nominate or elect as councillor a person holding, at the time of nomination, the office of councillor of the same burgh, unless he falls to retire at the date of the election, or has intimated his resignation of office to take effect at, or prior to, the said date.

**1142.** The nomination paper must be subscribed by two electors, and the form of assent appended to it must be signed by at least five other electors, and in the case of a burgh divided into wards, the proposers

<sup>1</sup> T.C. Act, 1900, s. 41.<sup>4</sup> T.C. Act, 1900, s. 43.<sup>2</sup> *Ibid.*, s. 42.<sup>5</sup> 3 Edw. VII. c. 34, s. 3.<sup>3</sup> T.C. Act, 1923, s. 1.



and assenters must be electors of the ward to which the nomination paper applies. The form of consent to be nominated on the nomination paper must be subscribed by the candidate or a law agent duly authorised by him.<sup>1</sup>

SUBSECTION (4).—*Withdrawal of Nomination.*

**1143.** Nominations may be withdrawn<sup>2</sup> by notice given to the town clerk before four o'clock afternoon of the Monday<sup>3</sup> immediately preceding the first Tuesday of November. The notice of withdrawal must be signed by the person nominated or his law agent duly authorised by him, and by his two proposers, in, as nearly as may be, the form of Schedule V. of the T.C. Act, 1900; but no such withdrawal is competent where its effect would be to reduce the total number of persons nominated for the ensuing burgh or ward election below the number necessary to supply the vacancies to be filled in the burgh or ward at that election.<sup>2</sup>

SUBSECTION (5).—*Notice of Candidates Nominated.*

**1144.** The town clerk must, not later than the Friday immediately preceding the election, cause public notice to be given of the names of all persons so intimated to him and not duly withdrawn. Such notice must be in, as nearly as may be, the form of Schedule VI. of the T.C. Act, 1900, and shall be affixed as provided in s. 42 of that Act. Where the number of nominations in any burgh or ward does not exceed the number of vacancies, the town clerk must, in his notice, intimate that fact, and state that there will be no poll in such burgh or ward.<sup>4</sup>

SUBSECTION (6).—*Acceptance and Rejection of Nomination Papers.*

**1145.** If the names of the person nominated by a nomination paper and of his proposers and assenters appear in the municipal register of a burgh without any disqualifying mark (the proposers and assenters, if the burgh is divided into wards, so appearing in respect of premises in the ward to which the nomination applies), and if the nomination paper is in, or as nearly as may be in, the form, and contains the particulars prescribed by Schedule IV. of the T.C. Act, 1900, the town clerk must receive the paper and deal with it as valid, but otherwise he must reject the nomination paper, and the same shall be null and void.<sup>5</sup>

SUBSECTION (7).—*Uncontested Election.*

**1146.** Where the number of persons nominated and not subsequently withdrawn does not exceed the number of vacancies in any burgh or ward, the persons nominated are held to be duly elected as councillors.<sup>6</sup>

<sup>1</sup> T.C. Act, 1900, s. 44.

<sup>2</sup> *Ibid.*, s. 45.

<sup>3</sup> T.C. Act, 1923, s. 1.

<sup>4</sup> T.C. Act, 1900, s. 46.

<sup>5</sup> T.C. Act, 1903, s. 5, substituted for s. 47 of the T.C. Act, 1900.

<sup>6</sup> T.C. Act, 1900, s. 48.

SUBSECTION (8).—*Poll in Contested Election.*

**1147.** Where an election has to take place, it is carried out by a poll on the first Tuesday of November under and in conformity with the provisions of the Ballot Act, 1872, the Election (Hours of Poll) Act, 1884, and any Acts extending and amending the same.<sup>1</sup> Where the council is satisfied that it is necessary, in order to afford to all electors such reasonable facilities for voting as are practicable in the circumstances, it may, by resolution passed not later than one month before the issue in any year of the notice of vacancies and dates of nomination and election, extend the hours prescribed by the T.C. Act, 1900, for the keeping open of the poll, but so that it shall not commence earlier than 7 A.M., and not be kept open later than 9 P.M.<sup>2</sup> The returning officer may, if he think fit, and without the consent of any candidate or other person, proceed with the counting of the votes during the hours between the close of the poll and nine o'clock on the succeeding morning.<sup>3</sup>

SUBSECTION (9).—*Date of Election in Fishing Burghs.*

**1148.** In any burgh where many electors are engaged in the fishing industry, and often absent from home in pursuance of their occupation at the statutory date of the annual election of councillors, the town council may petition the Secretary for Scotland to determine that the annual retiral and election of councillors shall take place upon a date other than the first Tuesday of November, and upon consideration of such petition, and after such advertisement and inquiry as he shall deem proper, the Secretary for Scotland may determine that the said retiral and election shall thereafter take place on a date to be fixed by him in his determination, not earlier than the first Tuesday of November or later than the first Tuesday of February, and, in the event of the Secretary for Scotland so determining, he shall in such determination specify the consequential alterations in the dates mentioned in the principal Act which are dependent upon the date of the annual election and on any other dates so dependent, and thereupon the said date of retiral and election and other dates as aforesaid shall be altered accordingly; and the Secretary for Scotland may, on petition as aforesaid, vary or withdraw such determination. Subs. 1 and 3 of s. 93 of the L.G. Act, 1889, shall apply to any inquiry ordered by the Secretary for Scotland under this section. The Local Government Board for Scotland may, upon any such determination as aforesaid being issued, make such order as may be necessary to give effect to the provisions of the L.G. Act, 1894, respecting the election of parish councillors in such burgh, and may, by such order, or by any subsequent order, make any necessary variation in the dates specified in the said Act, and determine any questions that may arise as to the election and proceedings of the parish council, and such determination shall be final.<sup>4</sup>

<sup>1</sup> T.C. Act, 1900, s. 49.

<sup>2</sup> T.C. Act, 1923, s. 2.

<sup>3</sup> *Ibid.*, s. 4.

<sup>4</sup> T.C. Act, 1903, s. 7.

SUBSECTION (10).—*Returning Officer.*

**1149.** The returning officer at elections is the provost of the burgh, but the acting chief magistrate acts as returning officer in the event (1) of the office of provost being at the time vacant; (2) of the provost being among the number of councillors falling to retire at the election, or of his term as provost expiring, or his resigning office as at the date of the election; (3) of the provost being incapacitated from acting by illness, absence, or any other cause; or (4) of the provost declining or failing to perform his duties.<sup>1</sup> In the event of the provost and all the bailies being amongst the number to retire, or being prevented from acting or failing to act as returning officer for any of the reasons foresaid, the town clerk or any person appointed by him shall act as returning officer.<sup>2</sup>

**1150.** The returning officer at an election of councillors for a burgh divided into wards may, without prejudice to any other power, by writing under his hand, appoint one or more fit persons to be his deputy or deputies for all or any of the purposes relating to such election, and may, by himself or by such deputy, exercise any powers and do any things which the returning officer is required to exercise or do in relation to such election.<sup>3</sup> In the case of an equality of votes of two or more candidates who cannot all be elected, the returning officer has and must exercise a casting vote.<sup>4</sup>

SUBSECTION (11).—*Declaration of Election.*

**1151.** It is the duty of the town clerk to cause the result of the election, whether contested or uncontested, to be declared within the town hall, council chambers, or other public hall or place in the burgh, not later than eight o'clock<sup>5</sup> afternoon of the day after the election, and to cause a written or printed statement thereof, signed by him, to be immediately thereafter affixed to the outside wall of the town hall, or of any premises in which the meetings of the town council are usually held.<sup>6</sup>

SUBSECTION (12).—*Notice to Councillors of their Election.*

**1152.** Immediately after the declaration of the poll and before the expiry of the day after the election, the town clerk must give notice to those elected of their election and require them to appear at the town hall, council chambers, or premises where the meetings of the council are usually held, on the second lawful day after the election between 10 A.M. and 8 P.M., when they must declare in presence of the returning officer or of the town clerk whether they accept or decline the office of councillor, and if anyone has been elected to more than one ward, he must then declare for which ward he intends to serve. If any person

<sup>1</sup> T.C. Act, 1900, s. 50.<sup>2</sup> *Ibid.*, s. 51.<sup>3</sup> T.C. Act, 1923, s. 3.<sup>4</sup> T.C. Act, 1900, s. 54.<sup>5</sup> T.C. Act, 1923, s. 6.<sup>6</sup> T.C. Act, 1900, s. 52.

elected fails to attend such meeting and to declare his acceptance of office, or to intimate his acceptance in writing subscribed by himself or his authorised law agent, addressed to the town clerk and delivered to him at his office before the hour of such meeting, the person so elected is held to have declined office, and his place is held to be vacant.<sup>1</sup>

SUBSECTION (13).—*Expense of Register and Elections.*

**1153.** The expense incurred in making up and printing a municipal register and in connection with the election of councillors and magistrates falls to be defrayed either from the common good, where such exists, or from the assessment imposed or levied in the burgh under the Registration Acts, or any assessment levied under the B.P. Act, 1892, or any local Act, as the council may determine; and the expenses may be divided and apportioned among the said common good and assessments as the council may determine.<sup>2</sup>

SECTION 12.—COUNCILLORS—QUALIFICATIONS AND DISQUALIFICATIONS.

SUBSECTION (1).—*Qualifications for Office.*

**1154.** A councillor is a member of the corporation or council elected to represent the individual members of the community of the burgh. Any elector, male or female,<sup>3</sup> in the burgh, who is not subject to any of the disqualifications mentioned in the T.C. Act, 1900, is eligible as a councillor. This franchise was extended to women by the Qualification of Women (County and Town Councils) (Scotland) Act, 1907,<sup>4</sup> which, however, debarred women from becoming burgh magistrates or judges in police courts, or if chairman of a county council or a provost, from being *ex officio* a justice of the peace or a burgh magistrate or a judge of the police. These disqualifications were removed by the Sex Disqualification Removal Act, 1914.<sup>5</sup>

SUBSECTION (2).—*Disqualifications for holding Office.*

**1155.** By the T.C. Act, 1900, a person is disqualified for being nominated or elected, and for being or continuing a councillor, if and while he, being a councillor, fails to attend any meeting of the council for a period of six consecutive months without leave of absence from the council; is an adjudged bankrupt within the meaning of the Bankruptcy Frauds and Disabilities (Scotland) Act, 1884, whose disqualification has not been removed in manner provided by that Act; holds any office or place of profit in the gift of the council; has directly or indirectly by himself, or his partner, any share or interest in any contract or

<sup>1</sup> T.C. Act, 1900, s. 53.

<sup>2</sup> *Ibid.*, s. 67.

<sup>3</sup> *Ibid.*, s. 12, amended by the Qualification of Women (County and Town Councils) (Scotland) Act, 1907 (7 Edw. VII. c. 48), s. 1 (2).

<sup>4</sup> 7 Edw. VII. c. 48.

<sup>5</sup> 9 & 10 Geo. V. c. 71, Schedule.



employment with, by, or on behalf of the council; but a person is not so disqualified or deemed to have any share or interest in such a contract or employment by reason of his having any share or interest in (a) any agreement for the loan of money, or any security for the payment of money only; (b) any newspaper in which any advertisement relating to the affairs of the burgh or council is inserted; (c) any company which contracts with the council for lighting, or supplying with water, or insuring against fire, any part of the burgh, or any property of the town council, or insuring persons in the employment of the town council against accident; or (d) any railway company, or any company incorporated by Act of Parliament or Royal Charter or under the Companies Acts.<sup>1</sup> By the Bankruptcy Act, 1883,<sup>2</sup> it is provided that if a person is "adjudged bankrupt" he is disqualified from holding certain offices, and by the Bankruptcy Frauds and Disabilities (Scotland) Act, 1884,<sup>3</sup> it is provided that in the application of the former Act to Scotland "adjudged bankrupt" shall include the case of a person whose estate has been sequestrated, or with respect to whom a decree of *cessio bonorum* has been pronounced by a competent Court. The disqualification applies<sup>4</sup> in the case of such a person being elected to or holding or exercising the office of provost, bailie, treasurer, dean of guild, deacon, convener of trades, or councillor or commissioner or magistrate of police, and if such bankruptcy occur during his term of office it thereupon becomes vacant.<sup>5</sup> It shall not be competent to nominate or elect as councillor a person holding, at the time of nomination, the office of councillor of the same burgh, unless he falls to retire at the date of the election in question, or has intimated his resignation of office to take effect at, or prior to, the said date.<sup>6</sup>

SUBSECTION (3).—*Effect of Election of disqualified Person.*

**1156.** In the event of any disqualified person being elected a councillor, or in the event of any councillor, after being elected, coming under any of the disqualifications specified in s. 13 of the T.C. Act, 1900, his office is nevertheless not vacated thereby, and he is not prevented from voting and acting as a councillor until (1) he voluntarily resigns; or (2) his disqualification has been determined by an election court under and within the meaning of the Elections (Scotland) (Corrupt and Illegal Practices) Act, 1890, on a petition presented to the sheriff in the manner set forth in the T.C. Act, 1900; or (3) a resolution declaring his office vacant has been passed by the town council at a meeting of which notice shall have been given to the councillors in question and the other councillors. Right to appeal is granted, but the appeal gives no right to the councillor to vote and act while it is pending.<sup>7</sup> It is

<sup>1</sup> Sec. 13, as amended by 4 & 5 Geo. V. c. 39.

<sup>2</sup> 46 & 47 Vict. c. 52, s. 32.

<sup>3</sup> 47 & 48 Vict. c. 16, s. 5 (1).

<sup>4</sup> *Ibid.*, s. 5 (2).

<sup>5</sup> *Thom v. Mags. of Aberdeen*, 1885, 12 R. 701.

<sup>6</sup> T.C. Act, 1903, s. 3.

<sup>7</sup> T.C. Act, 1900, s. 14.

provided also that if in the opinion of the election court any disqualified person has, in the knowledge of his disqualifications, made an oath or declaration *de fidei*, or taken his seat in the town council, it shall be in the power of the court to impose on him a fine not exceeding £100, to be paid to the town council and applied in such manner as they may direct.

SUBSECTION (4).—*Councillors who Retire.*

**1157.** In the case of several royal burghs the number of councillors was fixed by Statute 3 & 4 Will. IV. c. 76, and 15 & 16 Vict. c. 32, while in others the set or usage of the burgh regulated this, but both these Acts have been repealed by the T.C. Act, 1900, which provides<sup>1</sup> that the number of magistrates and councillors is to remain, until altered, in terms of that Act, the same as under the existing law. One-third, or a number as near thereto as practicable, of the whole council of every burgh goes out of office annually on the first Tuesday in November, and where the burgh is divided into wards, it is one-third of the councillors for each ward who retire.<sup>2</sup> The third which falls to retire consists of the councillors who have been longest in office.<sup>3</sup> The councillors who retire may be immediately re-elected. Where there is not a sufficient number of councillors three years in office to constitute the one-third of the council to go out, the deficiency is to be made up by selecting from the next younger class of councillors, and the principle of selection is that it is the member or members of that younger class who had the smallest number of votes who is to be taken; and in the case of an equality of votes or no contest, the council is to decide the order of retiral.<sup>4</sup>

SUBSECTION (5).—*Casual Vacancies.*

**1158.** Vacancies in the council occurring during the year by resignation, death, or disability are supplied *ad interim* by the remaining members of the council.<sup>5</sup> The person elected *ad interim* holds office only till the first Tuesday of November immediately following his election. It is competent to suspend and not necessary to reduce an illegal election, if the councillor has not taken the oath and been inducted,<sup>6</sup> but suspension is incompetent after he has been sworn in and acted for some time in his official capacity.<sup>7</sup>

SUBSECTION (6).—*Effect of Irregularity or Nullity in the Elections.*

**1159.** No irregularity or nullity in the election of any councillor or magistrate annuls or affects the election of any other councillor or magistrate, and all proceedings of the town council shall be valid notwithstanding any vacancy or the vote or presence of any councillor

<sup>1</sup> Secs. 10, 11.

<sup>2</sup> Sec. 34.

<sup>3</sup> Sec. 35.

<sup>4</sup> T.C. Act, 1900, s. 35; *Thomson v. Mags. of Rutherglen*, 1874, 3 R. 451, per L.P. Inglis.

<sup>5</sup> Sec. 36.

<sup>6</sup> *Monteith v. M'Gavin*, 1837, 16 S. 122.

<sup>7</sup> *Mags. of Glasgow v. Abbey*, 1825, 4 S. 266.

or magistrate against whose election or qualification any objection may exist: and the actings of a councillor or magistrate prior to his election being set aside or found null, or his qualification determined or office declared vacant, are equally valid and effectual as if such councillor or magistrate had been duly elected and not been disqualified.<sup>1</sup>

SUBSECTION (7).—*Election where Burgh has no Legal Council.*

**1160.** Where a burgh is from any cause without a legal council, any seven persons possessed of the qualifications entitling them to be placed on the municipal register may petition the sheriff requesting him to conduct an election, which he is bound to do, in terms of the T.C. Act, 1900.<sup>2</sup>

SUBSECTION (8).—*Returning Officer.*

**1161.** In the event of two or more candidates who cannot all be elected receiving an equal number of votes, the returning officer has and must exercise a casting vote.<sup>3</sup> The provost is the returning officer, but the acting chief magistrate acts as returning officer in the event (1) of the provostship being vacant at the time of the election; (2) of the provost being among the councillors falling to retire, or of his term of provost expiring, or his resignation as at the date of the election; or (3) of the provost declining or failing to perform his duties.<sup>4</sup> In the case of a new burgh the sheriff is the returning officer at the first election.<sup>5</sup> In the event of the provost and all the bailies being amongst the number to retire, or being prevented from acting or failing to act as returning officer for any of the reasons aforesaid, the town clerk or any person appointed by him shall act as returning officer.<sup>6</sup>

SUBSECTION (9).—*Number of Councillors.*

**1162.** The number of councillors for each existing burgh is, unless and until altered under the T.C. Act, 1900, that fixed by the Act 3 & 4 Will. IV. c. 77, with the relative Commission following thereon, and the Act 31 & 32 Vict. c. 188. The T.C. Act, 1900, provides a scale for burghs created after it came into force.<sup>7</sup> Where the population is under 10,000, the number of councillors, including magistrates, is 9, and the number of magistrates, including provost, is 3. Where the population is between 10,000 and 20,000, the numbers respectively are 12 and 5; between 20,000 and 50,000, 15 and 5; between 50,000 and 100,000, 18 and 7; between 100,000 and 200,000, 36 and 9; between 200,000 and 500,000, 75 and 12; 500,000 and upwards, 90 and 15. The sheriff may, where the population is less than 20,000, fix the number of councillors at 12 or 15, and where the population is between 50,000 and 100,000, at 21 or 24, if he thinks fit.

<sup>1</sup> T.C. Act, 1900, s. 65.

<sup>6</sup> B.P. Act, 1892, s. 26.

<sup>2</sup> Sec. 66.

<sup>6</sup> T.C. Act, 1900, s. 51.

<sup>3</sup> Sec. 54.

<sup>4</sup> Sec. 50.

<sup>7</sup> Sec. 10, Schedule II.



SUBSECTION (10).—*Declaration de fidei.*

**1163.** A councillor, on his admission to office, makes a declaration *de fidei administratione officii*. Prior to his making such a declaration, the validity of his election may be tried by way of suspension.<sup>1</sup> But, after he has accepted office and made the declaration, reduction of his election is necessary and suspension is incompetent.<sup>2</sup>

SUBSECTION (11).—*Appointments to Offices of Profit.*

**1164.** It is not competent for the town council to appoint a councillor to an office of profit in their gift or disposal.<sup>3</sup> No councillor incurs by his election or acceptance of office any other responsibility for the debts of the burgh, or the acts of his predecessors in office, than might have attached to him as a burghess or inhabitant independently of such election.<sup>4</sup>

## SECTION 13.—COMMISSIONERS OF POLICE.

**1165.** Commissioners of police were elected under the Burgh Police Acts or Private Police Acts to carry out the police administration of the burghs in which they held office. In burghs where magistrates or magistrates and town councillors or other municipal authority existed, these acted as commissioners under the Burgh Police Acts. The Town Council Acts now apply to all burghs in Scotland, and the municipal authority is now designated “the provost (or “lord provost”), magistrates, and councillors” of the burgh.<sup>5</sup>

**1166.** In burghs where the population is less than 10,000, the number of commissioners elected is 9, unless the sheriff see cause to fix the number at 12; where the population is between 10,000 and 20,000, 12; between 20,000 and 50,000, 15; 50,000 and 100,000, 18; between 100,000 and 200,000, 36; between 200,000 and 300,000, 75; 300,000 and upwards, 90. The commissioners meet at twelve o'clock the first Friday after the first election, and elect magistrates. By the T.C. Act, 1900,<sup>6</sup> the number of magistrates and councillors to be elected in each burgh shall, unless and until altered under that Act, remain the same as under the existing law, and provision is made<sup>7</sup> for altering the number by application to the sheriff. Under the Burgh Police Act of 1892, the magistrates in police burghs were, where the population was 50,000 and upwards, 1 chief magistrate and 6 other magistrates; where it was between 10,000 and 50,000, 1 chief magistrate and 4 other magistrates; and where the population was less than 10,000, 1 chief magistrate and 2 other magistrates. In burghs created after the commencement of the Act, the numbers shall be in accordance with the scale fixed by Schedule II. of the Town Councils Act. Where, accord-

<sup>1</sup> *Monteith v. M'Gavin*, 1837, 16 S. 122; 3 S. & M'L. 290.

<sup>2</sup> *Mags. of Glasgow v. Abbey*, 1825, 4 S. 266.

<sup>4</sup> *Ibid.*, s. 16.

<sup>5</sup> T.C. Act, 1900, s. 5.

<sup>3</sup> T.C. Act, 1900, s. 15.

<sup>6</sup> Sec. 10.

<sup>7</sup> Sec. 11.



ing to the existing law, the numbers differ from these or hereafter come to differ by alteration of population, the town council may apply to the sheriff to have the numbers increased or diminished so as to make them conform to this scale.<sup>1</sup>

#### SECTION 14.—TOWN COUNCIL TO BE BODY CORPORATE WITH COMMON SEAL.

**1167.** By the T.C. Act, 1900, it is provided that the town council of a burgh shall be a body corporate with a common seal,<sup>2</sup> and that subject to the provisions of the Act the council and magistrates of each existing burgh shall have such and the like rights, powers, authorities, and jurisdiction as were possessed by the council or commissioners and magistrates of such burgh according to the existing law. Every reference in any Act of Parliament to the commissioners of a police burgh shall, in the case of a police burgh constituted after the commencement of the Act, be read and construed as referring to the council thereof, and the council and magistrates of a police burgh constituted after the commencement of this Act shall have such and the like rights, powers, authorities, and jurisdiction as shall be possessed by the council and magistrates of police burghs in Scotland under the law for the time being.<sup>3</sup>

**1168.** It is also provided that “In any burgh the whole rights, powers, authorities, duties, liabilities, debts, officers and servants (*a*) of commissioners under the B.P. Act, 1892, and (*b*) of any body of police, gas, or water commissioners, consisting exclusively of members of the town council, and (*c*) of the burgh local authority under the Public Health (Scotland) Act, 1897, and the whole lands, works, and other assets vested in them respectively shall, in so far as this has not already been effected, be transferred to, imposed on, and vested in the town council, and all bonds and other deeds granted by such commissioners or local authority shall be binding on the town council, and every reference in any Act of Parliament, by-law, regulation, order, scheme, deed, or instrument to such commissioners or local authority shall, after the commencement of this Act, be read and construed as referring to the town council or to the individual councillors as the case may be; and, except in so far as is by this Act otherwise directed, or as the town council may otherwise resolve, it shall not be necessary to hold separate or special meetings for the transaction of business arising out of the powers of police, gas, or water commissioners, or of the local authority, hereby transferred, or to keep separate minute-books therefor. Provided that nothing in this section or Act contained shall be held to amalgamate any burghs or the councils thereof, or any funds or other assets separately administered at the commencement of this Act, or to alter any rating area, or to add to or diminish or otherwise affect

<sup>1</sup> T.C. Act, 1900, s. 11.

<sup>2</sup> Secs. 5, 6.

<sup>3</sup> Sec. 7.

existing security for debt, or existing burdens on any common good, or to make competent any payment or any giving in security, or any addition to the burden on any common good, which, before the commencement of this Act, would have been incompetent.”<sup>1</sup>

## SECTION 15.—PROVOST AND MAGISTRATES.

### SUBSECTION (1).—*Election.*

**1169.** The provost (or lord provost) and bailies are the burgh magistrates. In the royal and parliamentary burghs these were formerly elected under the Acts 3 & 4 Will. IV. cc. 76 and 77, and in burghs of regality and of barony their election was regulated to a certain extent by the charters of erection. These Acts have been repealed by the T.C. Act, 1900, which now regulates the election of the magistrates in the burghs of Scotland.

**1170.** On the Friday<sup>2</sup> immediately succeeding the day of each annual election of town councillors, they meet and elect from among their own number, by a plurality of voices, a provost (or lord provost) who is chief magistrate, and bailies to the number fixed by the set or usage of the burgh, in the case of royal burghs, or in terms of the T.C. Act, 1900, in the case of other burghs,<sup>3</sup> in so far as there are vacancies to be filled.

The returning officer, who is usually the provost,<sup>4</sup> or where he is absent, one of the bailies in the order of seniority, or failing any bailie, one of the councillors to be appointed by the meeting, presides at the meeting and has a casting vote in case of equality of votes.<sup>5</sup> Where more than one bailie is elected at the same time, the council determines the order of seniority.<sup>5</sup> A vote by ballot is illegal.<sup>6</sup>

**1171.** If the council fail to meet on that day, or to fill up any of the vacancies at that or an adjourned meeting, they may do so at any subsequent meeting to be duly called, but if they fail to elect within the month of November in any year, it is lawful for the sheriff to appoint, and he shall, on the application of any four electors of the burgh, appoint<sup>7</sup> councillors to fill any vacancies, and if there be not any willing to accept office, he makes the appointments from the electors of the burgh of such persons as he deems proper, who thereby become councillors of the burgh, but whose term of office terminates at the next annual election. They are not reckoned as part of the number to retire at that election, nor does their appointment interfere in any way with the ordinary rotation of retiral of the other councillors.

**1172.** The election of magistrates is a statutory duty, and the Court will ordain its performance where the council fails or neglects to make the election.<sup>8</sup> A woman may be provost or bailie.<sup>9</sup>

<sup>1</sup> T.C. Act, 1892, s. 8.    <sup>2</sup> T.C. Act, 1900, s. 58.    <sup>3</sup> *Ibid.*, s. 10.    <sup>4</sup> *Ibid.*, ss. 50, 51.

<sup>5</sup> *Ibid.*, s. 58.

<sup>6</sup> *Watson v. Glasgow Police Comrs.*, 1832, 10 S. 481.

<sup>7</sup> T.C. Act, 1900, s. 59.

<sup>8</sup> *Herron v. T.C. of Renfrew*, 1880, 7 R. 497.

<sup>9</sup> 9 & 10 Geo. V. c. 71, Schedule.

SUBSECTION (2).—*Tenure of Office.*

1173. The provost holds office from the date of his election as such until the expiry of three years from the first Tuesday of November immediately preceding his election, and during that period (provided he continues to hold the office of provost) he continues to hold office as a councillor, and is held, at each of the elections occurring during his term of office, to have been the shortest time in office of the councillors for the burgh, or for the ward which he represents.<sup>1</sup> Each bailie holds office from the date of his election as such to the date at which he falls in ordinary course to retire as a councillor.<sup>2</sup>

1174. In the event of the provost being prevented at any time from fulfilling, or failing to fulfil, any of the duties of his office under the T.C. Act or under the B.P. Act of 1892, on account of illness, absence from home, or from attendance at any meeting or any other cause, such duty may be performed by the senior bailie, or, in the event of his being prevented from fulfilling it from any such cause, by the next senior bailie, and so on, through the whole number of bailies.<sup>3</sup> "Senior" means longest in office since his last election as bailie.<sup>4</sup>

1175. Any magistrate may resign office at any time on giving three weeks' notice in writing of his resignation to the town clerk, and his resignation takes effect on the expiry of the said three weeks. Any magistrate resigning office as a councillor, or ceasing for any reason to hold the office of councillor, is held *ipso facto* to vacate his office of magistrate at the same date as his office of councillor, but the resignation of the office of magistrate does not necessarily infer resignation as a councillor.<sup>5</sup>

SUBSECTION (3).—*Vacancies.*

1176. If a vacancy occurs among the magistrates from any cause other than retirement in ordinary rotation, the town council fills that up at a meeting, of which notices stating that the matter is to be then dealt with must be sent out by the town clerk within three weeks of the occurrence of the vacancy. The meeting must be held not sooner than five days and not later than ten days from the date of the notice, but it may be adjourned to a later date.<sup>6</sup> The councillor elected holds office on the usual conditions,<sup>7</sup> but it is not competent to elect an *ad interim* councillor during his interim appointment.<sup>6</sup>

1177. When any of the bailies go out at the annual retirement of one-third of the councillors, their places are supplied by election from among the councillors at the meeting held after the election of the council as above mentioned. The senior bailie is the magistrate who has been longest in office since his last election as such, while the most

<sup>1</sup> T.C. Act, 1900, s. 56.

<sup>2</sup> *Ibid.*, s. 57.

<sup>3</sup> *Ibid.*, s. 61.

<sup>4</sup> *Ibid.*, s. 4 (17).

<sup>5</sup> *Ibid.*, s. 63. For the purposes of ss. 63, 64, "magistrate" includes "honorary treasurer."

<sup>6</sup> *Ibid.*, s. 64.

<sup>7</sup> *Ibid.*, s. 58.



recently elected bailie is generally called the junior bailie, taking rank last in point of precedence.

SUBSECTION (4).—*Jurisdiction of Magistrates.*

1178. The B.P. Act, 1892,<sup>1</sup> enacts that the magistrates of police burghs (including stipendiary magistrates and sheriffs acting in the police Court) shall, within the burgh, have jurisdiction and power to take cognisance of all crimes, offences, and breaches of the police regulations in that Act or in any Act in force in the burgh, or of by-laws made thereunder, or of any offence against the Public Parks (Scotland) Act, 1878, or relative by-laws, or of any other crime or offence which is punishable by any public general or local statute or common law, and is within the jurisdiction of the magistrates of any royal burgh; and shall have the like jurisdiction within the burgh as any magistrate of a royal burgh, or any dean of guild of a royal burgh, has by the law of Scotland, and all jurisdiction to try offences and award punishment conferred on any justice of the peace or two justices of the peace or any magistrate by any Act, public or local, passed or to be passed, or any by-laws, orders, or regulations made in virtue thereof, and in force in the burgh; provided always that such jurisdiction shall not extend to the trial of offences against any of the Inland Revenue or Customs Acts.

SUBSECTION (5).—*Powers of Magistrates.*

1179. The magistrates grant warrants to arrest, to cite, and, failing appearance, to apprehend, and also grant search warrants.<sup>2</sup> The sheriff has power to sit and act in the police Court, with consent of the magistrates, on any special occasion, or under any continuing arrangement.<sup>2</sup> Certain crimes and offences cannot be tried in the police Court, *e.g.* the pleas of the Crown (murder, rape, robbery, and wilful fire-raising), theft by house-breaking, theft of an amount exceeding £10, and many other serious offences set forth in the Summary Jurisdiction (Scotland) Act, 1908.<sup>3</sup> The magistrate may, however, commit the person charged with such offences to prison for examination, for any period not exceeding four days, when by appropriate procedure the accused passes to a higher Court.<sup>4</sup> Proceedings before the magistrate are confined to summary procedure. The procedure relating to offences committed in harbours, rivers, or arms of the sea forming the boundary of the jurisdiction of two or more Courts, or near such boundary, or during a journey, or in several counties, is dealt with in the Summary Jurisdiction (Scotland) Act, 1908.<sup>5</sup>

1180. Burgh magistrates have civil jurisdiction in matters of debt, service, and questions of possession among the inhabitants, but in practice this jurisdiction is rarely exercised.<sup>6</sup> By the Act 1663, c. 6, the

<sup>1</sup> Sec. 454.

<sup>2</sup> B.P. Act, 1892, ss. 463, 464, 466.

<sup>3</sup> 8 Edw. VII. c. 65, s. 8.

<sup>4</sup> *Ibid.*, s. 9.

<sup>5</sup> Sec. 10

<sup>6</sup> Ersk., Prin. i. 4, 12.



magistrates of royal burghs have power to value and sell ruinous houses where the proprietors refuse to rebuild or repair them. The B.P. Act, 1892,<sup>1</sup> conferred powers on the police commissioners (now vested in the town council<sup>2</sup>) to secure and, if necessary, to sell ruinous buildings within burgh.

#### SECTION 16.—SERVICE OF WRITS, EXECUTION OF DEEDS, AND FORM OF TITLE TO LANDS.

**1181.** The town council sues and is sued in its corporate name, and service on it of all legal processes and notices is effected by service on the town clerk.<sup>3</sup> The title to all lands acquired by the town council must be taken in its corporate name, and all deeds, contracts, and writs of importance requiring to be executed by the town council must also be granted in the corporate name, and be signed at a meeting of the council by the provost or other magistrate or councillor presiding, and the town clerk, either with or without the common seal being adhibited. Sealing, required by the B.P. Act, 1892,<sup>4</sup> is no longer necessary. Such signature does not operate to make any person so signing personally liable for the repayment of any debt or the fulfilment of any obligation incurred by the town council.<sup>5</sup>

#### SECTION 17.—APPOINTMENT OF OFFICERS.

**1182.** Under the B.P. Act, 1892, the town council has power to appoint, at such salaries as it thinks fit, to be paid out of the assessments leviable under the Act in such proportions as the council may determine, clerks, treasurers, collectors, surveyors, inspectors, and all other persons whose appointment is not specially provided for therein, to be employed in the execution of the Acts; and to provide such offices as may be necessary, and to remove and suspend such persons at pleasure. The town council may also fix the number and description of officers to be employed in the execution of the Act, and their wages, and may increase or diminish their number and make orders and regulations for their government.<sup>6</sup> Before removal, officials and other employees are entitled to reasonable notice at common law.<sup>7</sup> The same person may hold any two or more of the offices of burgh surveyor, sanitary inspector, and inspector of cleansing.<sup>8</sup> The treasurer and the collector may be the same person.<sup>9</sup> The clerk and treasurer must not be the same person except in burghs having not more than 5000 inhabitants, in which case the town clerk may be treasurer, and except in cases of persons who held the offices jointly before the passing of the T.C. Act, 1900.<sup>10</sup>

<sup>1</sup> Secs. 191 to 200, as amended by the B.P. Act, 1903, Schedule.

<sup>2</sup> T.C. Act, 1900, s. 7.

<sup>3</sup> *Ibid.*, s. 9.

<sup>4</sup> Sec. 55 (2), repealed T.C. Act, 1900, Schedule I.

<sup>5</sup> B.P. Act, 1892, s. 55 (4).

<sup>6</sup> *Morrison v. Abernethy School Board*, 1876, 3 R. 945.

<sup>7</sup> B.P. Act, 1892, s. 76.

<sup>8</sup> T.C. Act, 1900, ss. 86, 87.

The chief constable may also hold any one or more of the offices of burgh prosecutor, burgh surveyor, inspector of cleansing, inspector of lighting, sanitary inspector, and fire-master.<sup>1</sup> The burgh surveyor may also hold the office of master of works in connection with the dean of guild court.<sup>2</sup> The town council may, in the case of all officers appointed by them, require them to find suitable security for the due execution of their offices.<sup>3</sup>

## SECTION 18.—THE TOWN CLERK.

### SUBSECTION (1).—*Qualifications.*

**1183.** The qualifications for the office of town clerk are not laid down authoritatively either by the common law or by statute. In former times it was the duty of the town clerk of royal burghs to act as notary in all infeftments granted of burgage property within the burgh, and it was necessary that he should be a notary public. This practice has been swept away by legislation; but it is still convenient that the town clerks of all burghs should be notaries public, as they may have protests to take, record, and extend; and, in view of the complexity and extent of the modern legislation affecting burgh government, it is almost a necessity for the town clerk to be a qualified law agent. As the holder of an office or place of profit in the gift or disposal of the town council he cannot lawfully be a town councillor; <sup>4</sup> nor can the council appoint a councillor to the office.<sup>5</sup> A town clerk cannot be a Member of Parliament,<sup>6</sup> or act as clerk of Court in any lawsuits in which he is personally interested.<sup>7</sup>

### SUBSECTION (2).—*Appointment.*

**1184.** The appointment of the town clerk in royal burghs has by immemorial usage rested with the magistrates and council. This is now statutory. By the T.C. Act, 1900,<sup>8</sup> the town council must appoint a fit person to be the town clerk. No special mode of election is prescribed. The election of a town clerk, therefore, must be made in the same manner as the election of any other officer of the corporation. He must be appointed at a duly called and constituted meeting of the magistrates and council. Where there is a competition for the office, he must be elected by a majority of the members present. If there be only two candidates, the majority will be easily ascertained; but if there be three or more, "the proper form of taking the vote is to strike off the candidate who has the fewest votes, and to follow out this course until no more than two remain, the vote between whom will be decisive."<sup>9</sup> If there be a motion for adjournment, this must not be met with a motion to elect one candidate, but by a direct negative to proceed.<sup>10</sup> In the case last

<sup>1</sup> B.P. Act, 1892, s. 78.

<sup>2</sup> *Ibid.*, s. 204.

<sup>3</sup> T.C. Act, 1900, s. 89.

<sup>4</sup> *Ibid.*, s. 13 (4).

<sup>5</sup> *Ibid.*, s. 15.

<sup>6</sup> 2 & 3 Will. IV. c. 65, s. 36.

<sup>7</sup> *Manson v. Smith*, 1871, 9 M. 492; *Macbeth v. Innes*, 1873, 11 M. 404.

<sup>8</sup> Sec. 78.

<sup>9</sup> L. Rutherford Clark, quoted in Irons, B.P. Act, 1892, p. 74.

<sup>10</sup> *Gibson v. Kerr*, 1856, 19 D. 261.

quoted, Lord Ivory said: "You must so manage that each individual councillor may give his vote for the one candidate or the other as he pleases; and, further, you are not to mix up the voting for an election with the voting for adjournment." A vote by ballot seems to be illegal.<sup>1</sup> The salary of the town clerk is fixed by the town council and is not subject to regulation by the Court.<sup>2</sup>

SUBSECTION (3).—*Tenure in Royal Burghs.*

**1185.** The town clerk of a royal burgh holds his office by legal title *ad vitam aut culpam*, and is not removable therefrom arbitrarily, but only on just cause and by process of law, and with the authority of the Court of Session,<sup>3</sup> even though the terms of his appointment bear to be "during the pleasure of the council,"<sup>4</sup> or for a period of years, though the term stated may have expired.<sup>5</sup> The magistrates and council cannot annex any conditions to the appointment which are illegal or *ultra vires*.

SUBSECTION (4).—*Tenure in other Burghs.*

**1186.** The T.C. Act, 1900, provides <sup>6</sup> that in the case of any burgh where the office of town clerk is regulated by local Act, the tenure of office shall be in accordance with the provisions of such Act, and in the case of royal burghs where the same is not so regulated, the tenure of office shall be the same as the tenure in such burghs according to the existing law. In the case of parliamentary burghs, where the office of town clerk is not regulated by local Act,<sup>6</sup> and all other burghs, the tenure shall be during the pleasure of the town council; provided that in such case the town clerk shall not be removed from office except by a vote of not less than two-thirds of those members of the town council who shall be present at a meeting of the town council, specially called for the purpose, by a circular addressed to the members of the town council not less than seven nor more than fourteen days before such meeting.<sup>6</sup>

SUBSECTION (5).—*Plural Tenure.*

**1187.** Where the office of town clerk is held by one or more persons who are able and willing to perform the duties, the town council is not entitled, without the consent of the holder or holders, to appoint an additional town clerk. Even where the office is held by two persons under an appointment "to be conjunct common clerks in terms of law," and one has died but the other is able and willing to perform the duties,

<sup>1</sup> *Watson v. Glasgow Police Comrs.*, 1832, 10 S. 481.

<sup>2</sup> *Sutherland v. Wick Mags.*, 1905, 7 F. 374.

<sup>3</sup> *Mags. of Rothesay v. Carse*, 1903, 5 F. 383; *Mags. of North Berwick v. Lyle*, 1885, 23 S.L.R. 214.

<sup>4</sup> *Simpson v. Tod*, 1824, 3 S. 150 (N.E. 102).

<sup>5</sup> *Farish v. Mags. of Annan*, 1836, 15 S. 107.

<sup>6</sup> Sec. 78, as amended by T.C. Act, 1903, s. 6.

the town council do not appear to be entitled to appoint a second town clerk without the consent of the survivor.<sup>1</sup>

#### SUBSECTION (6).—*Interim Appointment.*

**1188.** It is very doubtful whether the town council can, except when the office is vacant, competently appoint an interim clerk, even for the purpose of officiating in matters in which the town clerk cannot act, or whether they can grant authority to any other person to perform such duties. By the T.C. Act, 1900,<sup>2</sup> the town council of any burgh in the case of a vacancy may make an interim appointment, to endure until the appointment of a successor to the town clerk. When it becomes necessary to appoint an interim clerk or other person to perform duties which the town clerk cannot lawfully perform,<sup>3</sup> or during the incapacity of a town clerk,<sup>4</sup> or if a vacancy in the office occur whereby a town council is unable to elect a town clerk permanently, the proper course is to apply to the Court of Session, which will make the necessary appointment *ad interim* on just cause being shewn. Where proceedings are actually in dependence, however, with reference to the office, as possessed and exercised by a person elected and holding a *prima facie* title to it, the Court will not interfere with the person in possession.<sup>5</sup> Pending proceedings for removal of a town clerk of a royal burgh on the ground of inefficiency the Court made an interim appointment.<sup>6</sup>

**1189.** During any vacancy in the office of town clerk any duty of the town clerk may be performed by any depute who may have been appointed by the last holder of the office, and all intimations required to be made to the town clerk may be made to such depute; and, failing such depute, any duty of the town clerk in relation to the issue of notices for meetings of the council or the conduct of any election may be performed by, and all such intimations may be made to, the provost or acting chief magistrate.<sup>2</sup>

#### SUBSECTION (7).—*Salary.*

**1190.** The amount of the town clerk's salary is fixed by the town council, and the Court cannot interfere with the exercise of their discretion.<sup>7</sup> Where a town clerk sued for additional remuneration for his services in preparing bonds for loans to the town council as local authority under the Public Health Acts, his claim was rejected.<sup>8</sup> The T.C. Act, 1900, provides<sup>9</sup> that if in consequence of the passing of that Act any duties are imposed upon the town clerk in addition to those which he

<sup>1</sup> *Mags. of Forfar v. Adam*, 1822, 1 S. 400 (N.E. 376); 1823, 2 S. 281 (N.E. 248).

<sup>2</sup> Sec. 78.

<sup>3</sup> *Duff v. Mags. of Elgin*, 1823, 2 S. 117 (N.E. 109); *Tait*, 1848, 10 D. 1365.

<sup>4</sup> *Mags. of Newburgh*, 1864, 3 M. 127.

<sup>5</sup> *Mags. of Annan v. Farish*, 1835, 14 S. 111; 2 S. & M'L. 930.

<sup>6</sup> *Mags. of Rothesay v. Carse*, 1902, 4 F. 641.

<sup>7</sup> *Sutherland v. Mags. of Wick*, 1905, 7 F. 374.

<sup>8</sup> *Mags. of Cupar v. Anderson*, 1911, 2 S.L.T. 222.

<sup>9</sup> Sec. 79.



was bound to perform prior thereto, the Council may pay to him such additional remuneration as they may think proper.<sup>1</sup>

#### SUBSECTION (8).—*Duties.*

**1191.** By the T.C. Act, 1900,<sup>2</sup> the town clerk has the charge and custody of, and is responsible for, the charters, deeds, records, and documents of the burgh, and they are kept as the council direct. If, therefore, the magistrates and council, or any of them, take or retain possession of these documents and records, they will not only be ordained to deliver such to the town clerk, but may be found personally liable for the expenses to which he may be put in vindicating his rights.<sup>3</sup> The town clerk is bound to furnish extracts from the records to persons shewing a proper interest; and if he refuse or fail to do so, he is liable personally in expenses, even though his failure arise from the refusal of the magistrates and council to give him possession of the records; but in that case he is entitled to relief against those who have illegally retained them.<sup>4</sup> The extracts must be complete excerpts from the record of proceedings of the town council relating to the specific matter, and not merely such parts or portions as the town clerk may think proper. If the object of requiring extracts be avowedly for a private purpose, and to aid one of the parties in a lawsuit, the clerk may be justified in declining to give them<sup>5</sup> except under the orders of the Court. Generally, however, unless the town clerk has good reason to apprehend that the public interest would suffer by giving access to the records and furnishing extracts, it is the prudent and proper course for him to afford such access, and give whatever extracts may be required. He is entitled to be paid for such extracts, and to reasonable remuneration for searching the minutes therefor. A town clerk is not bound at the instance of a litigant to produce the burgh court books in process, as parties having right, who wish to examine these, ought to inspect them at the burgh chambers, and obtain the necessary extracts.

**1192.** The town clerk usually attends the meetings of the town council in its corporate capacity, and it is his duty to write out the minutes and keep the records of the town council and its committees. It is also his duty to prepare and issue all such notices as the council may require to issue in the conduct of its business, or as may be required in the conduct of any election. He must also perform all the duties laid upon the clerk to the commissioners under the B.P. Act, 1892, or under any other Act conferring powers or imposing duties on the council. If in consequence of the passing of the T.C. Act, 1900, any duties are imposed

<sup>1</sup> See *Forbes v. Mags. of Banff*, 1856, 18 D. 1210, as to the work which a town-clerk's salary covers.

<sup>2</sup> Sec. 78.

<sup>3</sup> *Spence v. Cunningham and Cunningham v. Mags. and Council of Linlithgow*, 1830, 8 S. 1015; *Finnie v. M'Intosh*, 1858, 6 M. 1066.

<sup>4</sup> *Tod v. Conolly*, 1824, 3 S. 153 (N.E. 103); *Fotheringham v. Williamson*, 1838, 16 S. 904; *Spence v. Cunningham*, *supra*.

<sup>5</sup> *Fotheringham v. Williamson*, *supra*.

upon the town clerk in addition to those which he was bound to perform prior thereto, the council may pay to him additional remuneration therefor as they may think proper.<sup>1</sup> The town clerk may appoint one or more persons approved by the town council to act as his depute or deputies.<sup>2</sup>

**1193.** The town clerk may be, and usually is, clerk of the burgh police court. No town clerk, town clerk depute, partner of or person in the employment of a town clerk, can act as agent or solicitor in the trial of any offence in any police court of the burgh, "and in the event of a contravention of this provision, such clerk shall be thenceforth disqualified from holding any office under the town council and from being a councillor, but the disqualification may be removed on the recommendation of the town council by order under the hand of the Secretary for Scotland."<sup>3</sup> The town clerk cannot be pursuer in the court of which he is clerk,<sup>4</sup> and as clerk he must attend that court when the bailies are performing their judicial functions as judges of that court, and must write out their judgments.<sup>5</sup>

**1194.** It does not seem to be part of the duty that the town clerk can insist on performing, or be compelled to perform, to act as assessor. When he is called on in the administration of the affairs of the burgh to act as notary or agent, a duty which any other professional man might perform, that is outwith his official duty, and he then becomes the agent for the burgh, and is entitled to be remunerated as such.<sup>6</sup>

The town clerk has, besides, other and onerous duties which are imposed upon him both by the common law and by statute, but which are too numerous to specify.<sup>7</sup>

#### SUBSECTION (9).—*Removal from Office.*

**1195.** The appointment being in royal burghs *ad vitam aut culpam*, the town clerk cannot be removed except for *culpa* or incapacity. In *Sir William Thomson v. The Town of Edinburgh*,<sup>8</sup> the town clerk sought to have the act of deposition reduced, on the ground that the punishment was incommensurate with the fault, and that no real damage had resulted. The Court repelled the reasons of reduction, and found the sentence not to be unjust, the fault being of "knowledge and importance," but found that if it could be proved that the fault "was not of knowledge but of mere omission incident to any person of the greatest diligence, they would not find that a sufficient ground to depose him." It is not clear that a town clerk can be removed from his office on the ground of incapacity. In one case,<sup>9</sup> Lord Rutherford Clark

<sup>1</sup> T.C. Act, 1900, ss. 78, 79.

<sup>2</sup> *Ibid.*, s. 80.

<sup>3</sup> *Ibid.*, s. 81.

<sup>4</sup> *Campbell v. M'Cowan*, 1824, 3 S. 245 (N.E. 173); *Macfarlane v. A. B.*, 1827, 5 S. 537 (N.E. 504), affirmed 1830, 4 W. & S. 123.

<sup>5</sup> T.C. Act, 1900, ss. 78 and 80; *Orr v. Alston*, 1912, 1 S.L.T. 95.

<sup>6</sup> *Forbes v. Mags. of Banff*, 1856, 18 D. 645, 1210; *vide Mags. of Cupar v. Anderson*, 1911, 2 S.L.T. 222.

<sup>7</sup> See T.C. Act, 1900, s. 78 *et passim*.

<sup>8</sup> 1665, Mor. 13090.

<sup>9</sup> *Wright v. Lockerbie*, 1st July 1876 (not reported) (see Irons, Police Law, 797).

indicates an opinion that the town clerk of a royal burgh cannot hold his office when he becomes incapacitated; but all the length the Court has yet gone in such a case was to appoint an interim town clerk during the incapacity of the town clerk on the petition of the magistrates.<sup>1</sup> The council cannot dismiss the clerk without the intervention of the Court, but they may pass a resolution dismissing their clerk, and a subsequent declaration to find that their action was justified is competent.<sup>2</sup> Wilful or grossly negligent conduct inconsistent with the public service is *culpa*, which will justify removal. In *Mags. of North Berwick v. Lyle*<sup>3</sup> the circumstances were held not to justify removal. In several of the larger burghs the office of town clerk is regulated by statute applicable to the burgh.

**1196.** Town clerks of parliamentary burghs are in much the same position as those of royal burghs, with the exception of the tenure of office. With regard to this, s. 26 of 3 & 4 Will. IV. c. 77, provided that the magistrates and council might elect a town clerk for the period of one year, without prejudice to his re-election, and also without prejudice to the right of any existing town clerk in any such burgh to hold his office of town clerk or clerk to the magistrates and council *ad vitam aut culpam*. With the exception of clerks who were appointed *ad vitam aut culpam* prior to the passing of this Act, all other town clerks of parliamentary burghs could only be appointed for one year.<sup>4</sup> Where the tenure is not regulated by local Act, the tenure of town clerks in 1903 and of future town clerks is now during the pleasure of the council,<sup>5</sup> and the town clerk is not removable except by a vote of not less than two-thirds of the council present at a meeting specially called for the purpose.<sup>6</sup>

**1197.** The clerk to a burgh of barony or regality holds his office during the pleasure of the magistrates only, and has no right to hold it *ad vitam aut culpam*,<sup>7</sup> and it does not alter the condition of his tenure though the burgh may have become a parliamentary burgh.<sup>8</sup> In all burghs other than royal burghs and burghs where the tenure is regulated by local Act,<sup>9</sup> the tenure is now during the pleasure of the council, but the town clerk is not removable from office except by a vote of not less than two-thirds of the council present at a meeting specially called for the purpose.<sup>6</sup>

#### SUBSECTION (10).—*Accommodation for Town Clerk.*

**1198.** If the town clerk has been provided with apartments or chambers in the town house of the burgh for the performance of his official duties, it is incompetent for the magistrates to proceed, by way

<sup>1</sup> *Mags. of Newburgh*, 1864, 3 M. 127.

<sup>2</sup> *Mags. of Rothesay v. Carse*, 1903, 5 F. 383.

<sup>3</sup> 1885, 23 S.L.R. 214.

<sup>4</sup> *Dykes v. Mags. of Port Glasgow*, 1840, 2 D. 1274; *Morison v. Mags. of Greenock*, 27th May 1806, referred to by L. Moncreiff in *Dykes's* case.

<sup>5</sup> T.C. Act, 1903, s. 6.

<sup>6</sup> T.C. Act, 1900, s. 78.

<sup>7</sup> *Morison v. Mags. of Greenock*, *supra*.

<sup>8</sup> *Dykes v. Mags. of Port Glasgow*, *supra*.



of summary removing before the sheriff, to deprive him of the apartments he is occupying.<sup>1</sup> Even where a town hall was erected, partly by public subscription and partly by funds contributed by the town council, on a site provided by the council, with a view to accommodation being made for all the purposes of the burgh, and the plans referred to "two rooms for town clerk's offices," it was held that the town clerk was entitled, free of rent, to such accommodation as could reasonably be afforded him consistently with other public requirements.<sup>2</sup>

### SECTION 19.—OTHER BURGH OFFICIALS.

#### SUBSECTION (1).—*The Town Clerk Depute.*

**1199.** The town clerk depute is appointed by the town clerk, who may appoint more than one. The depute may do any act competent to the town clerk.<sup>3</sup>

#### SUBSECTION (2).—*The Treasurer and Collector.*

**1200.** The town council must appoint these officers.<sup>4</sup> The same person may hold both offices at the same time.<sup>5</sup> Neither office can be held along with the town clerkship, nor can a town clerk's partner or a person in his service hold either office,<sup>6</sup> except in burghs of not more than 5000 inhabitants.<sup>6</sup> These officers must give a bond of surety for their intromissions, and they hold office during the pleasure of the town council.<sup>4</sup> If either is convicted of wilfully secreting or of not accounting to the council for money received by him as treasurer or collector, he "shall forfeit triple the amount thereof to the council, besides being liable to be punished according to law, and to be deprived of his office."<sup>4</sup> The town council may confer the title of chamberlain or such other title as it may resolve upon the treasurer.<sup>4</sup> The treasurer must lodge all money received by him in a bank fixed by the council in an account opened in the corporate name of the council, to be operated upon by the treasurer or collector with the counter signatures of one or more town councillors as the council may appoint.<sup>7</sup> If either officer becomes insolvent and moneys chargeable against him are not paid by his cautioner or sureties, the deficit is chargeable against the common good or against such assessments as the council may determine.<sup>8</sup> In cases where, under statute or the set or usage of any burgh, it has been the custom to appoint a honorary treasurer, the council may continue to make such appointment, with certain powers.<sup>9</sup>

#### SUBSECTION (3).—*The Honorary Treasurer.*

**1201.** In burghs in which prior to the T.C. Act, 1900, a councillor was appointed honorary treasurer, the council may continue the appoint-

<sup>1</sup> *Mags. of Dundee v. Kerr*, 1833, 12 S. 173, 310.

<sup>2</sup> *Downie v. Mags. of Annan*, 1879, 6 R. 457.

<sup>3</sup> T.C. Act, 1900, ss. 78, 80.

<sup>6</sup> *Ibid.*, s. 87.

<sup>7</sup> *Ibid.*, s. 85.

<sup>4</sup> *Ibid.*, s. 84.

<sup>8</sup> *Ibid.*, s. 88.

<sup>5</sup> *Ibid.*, s. 86.

<sup>9</sup> *Ibid.*, s. 90.



ment, and the honorary treasurer has an office of general supervision over the salaried treasurer, and may be appointed convener of the finance committee.<sup>1</sup>

#### SUBSECTION (4).—*The Burgh Surveyor.*

**1202.** The town council must appoint a duly qualified person "as a surveyor of the paving and drainage and other works authorised under the provisions of this Act, who shall be called the burgh surveyor."<sup>2</sup> His duties as laid down in the Acts are of an extensive and varied character. He supervises the formation of new streets, the register and plan of new streets, examines staging, roofs, platforms, takes steps to prohibit the erection or demolition of buildings, stagings, and cranes, inspects buildings, tests strengths of building material, gives warrant for minor alterations, has powers relating to advertising sites and hoardings, and many other duties and powers. Disobedience to his orders may be a guild offence.<sup>3</sup> The conditions of his appointment have been already dealt with.<sup>4</sup> He is not entitled, apart from special agreement, to a commission on work done under his supervision even when it is larger or more exacting than usually falls to be done by him, or disproportionate to his salary; unless in cases where the work he has done is completely outside the scope of a burgh surveyor's duties.<sup>5</sup>

#### SUBSECTION (5).—*Public Health Officials.*

**1203.** The town council must appoint a sanitary inspector.<sup>6</sup> They must also appoint a medical officer of health, who must be a registered medical practitioner, and if appointed after 15th May 1894, must be registered in the medical register as holder of a diploma in sanitary science, public health, or State medicine under the Medical Act, 1888, s. 21. The sanitary inspector and medical officer of health hold office subject to the provisions of the L.G. Act, 1889.<sup>7</sup>

#### SUBSECTION (6).—*The Burgh Prosecutor.*

**1204.** The town council must appoint in writing a fit person to be burgh prosecutor during their pleasure. He may engage in private practice unless his appointment excludes that. If there are more police courts than one in the burgh, the council may appoint two or more deutes to the burgh prosecutor. All proceedings before the magistrates must be conducted in the official name and at the instance of the burgh prosecutor, but in his absence the magistrate may appoint a competent person to act in the interim.<sup>8</sup>

<sup>1</sup> T.C. Act, 1900, s. 90.

<sup>2</sup> B.P. Act, 1892, s. 73.

<sup>3</sup> B.P. Act, 1903, s. 103 (12) (m).

<sup>4</sup> Para. 1182, *supra*.

<sup>5</sup> *Mackison v. Burgh of Dundee*, 1909 S.C. 971; App. Ca., 1910 S.C. (H.L.) 27.

<sup>6</sup> B.P. Act, 1892, s. 74; 60 & 61 Vict. c. 38, s. 15.

<sup>7</sup> Sec. 54 (4).

<sup>8</sup> B.P. Act, 1892, ss. 461, 462.

**1205.** Where any order or sentence following on an application by the burgh prosecutor is brought under review, or where any action is brought against him, or any officer or constable, in consequence of anything done in pursuance of the B.P. Act, 1892, or of such order or sentence, the burgh prosecutor must immediately make a report of the facts and circumstances to the town council, who must thereupon resolve either that such order or sentence so brought under review, or such action, shall be defended at the expense of the council, or that it shall not be so defended. If the council resolves to defend, it must take control of the case and relieve the burgh prosecutor or other defender from liability for all or any of the conclusions of the action. If the council resolves that the action shall not be so defended, it may, if it sees cause, agree to relieve the burgh prosecutor or other defender from the consequences of not defending the action, and shall in such case relieve them accordingly.<sup>1</sup>

SUBSECTION (7).—*The Clerk in the Police Court.*

**1206.** The council must appoint a proper person to be clerk in the police court, and he may be and usually is the town clerk. Subject to the approval of the council, he may appoint deposes by writing under his hand, for whom he is responsible; and such deposes have all the powers of the clerk.<sup>2</sup>

SECTION 20.—STIPENDIARY MAGISTRATE.

**1207.** A stipendiary magistrate is a magistrate appointed to exercise within burghs the summary jurisdiction of a sheriff, police magistrate, justice of the peace, or justices of the peace, but having a salary attached to his office in contradistinction to the unpaid magistracy. The town council of any burgh is empowered<sup>3</sup> to resolve that a stipendiary magistrate should be appointed to officiate in the police courts or court of the burgh, and is authorised to fix the salary which may be paid to him. The town council may from time to time increase his salary. The Secretary for Scotland makes the appointment, provided the salary fixed is in his view satisfactory. The person to be appointed must possess the qualifications required for a sheriff-substitute in Scotland, which are that he must be an advocate or law agent of not less than five years' standing in his profession.<sup>4</sup>

**1208.** The tenure of office of the stipendiary magistrate is the same as that possessed by a sheriff-substitute. He is only removable from his office for incompetency or misbehaviour, by the like process and by the same authority as is provided by law for the removal of a sheriff-substitute. A salaried sheriff-substitute is only removable from office by the Secretary for Scotland for inability or misbehaviour, upon a

<sup>1</sup> B.P. Act, 1892, s. 507. See also Summary Jurisdiction (Scotland) Act, 1908, s. 59, and Licensing (Scotland) Act, 1903, s. 104.

<sup>2</sup> B.P. Act, 1892, s. 460.

<sup>3</sup> B.P. Act, 1892, s. 455.

<sup>4</sup> 7 Edw. VII. c. 51, s. 12.

report by the Lord President of the Court of Session and the Lord Justice-Clerk for the time being.<sup>1</sup> Stipendiary magistrates, whether appointed before or after the passing of the Act, are entitled, out of the burgh general assessment, to retiring allowances for like reasons, on the like conditions and of the like amounts, having regard to their salaries and periods of service, as are provided by law in the case of sheriff-substitutes.<sup>2</sup>

**1209.** Stipendiary magistrates possess within the burgh the same jurisdiction, powers, and authorities as the other magistrates of the burgh acting in the police court, or any of them.<sup>3</sup>

The Stipendiary Magistrate Jurisdiction (Scotland) Act, 1897,<sup>3</sup> confers on the stipendiary the summary jurisdiction exercised by the sheriff or any justice of the peace or two justices of the peace in criminal matters under s. 3 of the Summary Procedure (Scotland) Act, 1864, or under Acts directing summary proceedings to be taken. For the third section of the Act of 1864 there will now be substituted the fourth section of the Summary Jurisdiction (Scotland) Act, 1908. The jurisdiction and powers of summary courts are set forth in s. 7 of the latter Act.

The Act of 1897 provides that "any magistrate presiding in a police court may remit for trial to a stipendiary magistrate possessing jurisdiction any person brought before him charged with a crime or offence; but nothing herein contained shall affect the right and duty of the stipendiary magistrate or magistrate sitting in the police court to remit for trial to a higher court any person charged with a crime or offence of a serious nature."<sup>4</sup> It is also provided that "nothing contained in this Act shall limit or affect any right of appeal or review, and where proceedings are taken before a stipendiary magistrate in lieu of justices of the peace, the right of appeal, if any, to quarter sessions is hereby reserved."<sup>5</sup>

**1210.** Upon the death, removal, or superannuation of a stipendiary magistrate, the commissioners may resolve that the office shall be discontinued, or resolve then or at any future time that the office shall be continued or renewed, in which case the same provisions again apply.<sup>6</sup>

## SECTION 21.—BUSINESS OF THE TOWN COUNCIL.

### SUBSECTION (1).—*Meetings.*

**1211.** The council may hold meetings at such times and places as may be fixed by them from time to time, and certain meetings are fixed by statute, *e.g.* to elect magistrates, or to lay on assessments. Citations for statutory meetings and meetings under the standing orders of the council are sent out as a matter of course by the town clerk. All the councillors must be cited to attend all the meetings described above and all special

<sup>1</sup> 7 Edw. VII. c. 51, s. 13.

<sup>4</sup> Sec. 5.

<sup>2</sup> *Ibid.*, s. 20.

<sup>5</sup> Sec. 6.

<sup>3</sup> 60 & 61 Vict. c. 48, s. 3.

<sup>6</sup> B.P. Act, 1892, s. 456.



meetings. The notice is issued by the town clerk, and posted or delivered to the councillors twenty-four hours before the time of the meeting, and it must specify the agenda.<sup>1</sup>

Special meetings may be called. The town clerk is bound to call these when required in writing by the provost or acting chief magistrate, or on a written requisition signed by not less than one-fifth of the whole members of the council, stating the object of the meeting. The notices must be issued within twenty-four hours of the demand, and the meeting must take place within four days of the receipt of the requisition.<sup>2</sup> In case of special urgency the provost or acting chief magistrate may require the town clerk to call a special meeting to be held in less than twenty-four hours from the issue of the notices, but resolutions of the council at such a meeting are not binding until confirmed at an ordinary meeting.<sup>3</sup>

**1212.** One-third of the council is a quorum at any meeting.<sup>4</sup> Where, owing to resignations, it was not possible to get a quorum, the Court, on the petition of the town clerk, appointed a special election under the T.C. Act, 1900.<sup>5</sup> The chairman is the provost or acting chief magistrate, or, failing all the magistrates, a councillor chosen by the meeting. Whoever is chairman has a deliberative and, in case of equality, a casting vote.<sup>6</sup>

#### SUBSECTION (2).—*Standing Orders.*

**1213.** The town council may enact standing orders necessary or expedient for the conduct of their business, and may repeal, alter, or amend these. They may provide for the closure of debate, and for suspension of any councillor disregarding the authority of the chairman, or who is guilty of obstructive or offensive conduct at any meeting.<sup>7</sup>

#### SUBSECTION (3).—*Committees.*

**1214.** The town council may act through committees. All powers may be delegated to committees except power to raise money by rate or loan, or powers the delegation of which is forbidden by statute. In delegating their powers to committees the council either directs the committee to report or to carry out the matters remitted to them. The council names the convener and sub-convener and the quorum, and may allow a committee to appoint a sub-committee. The convener or sub-convener or a member of committee elected by the committee is chairman, and has a deliberative and, in case of equality, a casting vote. Committee meetings are convened by the town clerk.<sup>8</sup>

#### SUBSECTION (4).—*Minutes.*

**1215.** The town clerk keeps minute-books recording the proceedings and orders of the council and its committees. Normally, the minutes

<sup>1</sup> T.C. Act, 1900, s. 68.

<sup>2</sup> *Ibid.*, s. 69.

<sup>3</sup> *Ibid.*, s. 70.

<sup>4</sup> *Ibid.*, s. 71.

<sup>5</sup> *Tait*, 1905, 8 F. 170.

<sup>6</sup> T.C. Act, 1900, s. 73.

<sup>7</sup> *Ibid.*, s. 77.

<sup>8</sup> *Ibid.*, s. 74.



of any meeting have to be approved at the next meeting, and are signed by the chairman of the latter meeting unless they are minutes of committee meetings, when they are signed by the chairman of the meeting to which they refer, or the chairman of the next meeting of committee.<sup>1</sup> Want of notice or informality of notice does not invalidate the proceedings at the meeting following, and in any case the proceedings of any informally convened meeting must be validated by confirmation at a subsequent meeting duly called.<sup>2</sup>

## SECTION 22.—BURGH RECORDS.

**1216.** Possession of the charters of the burgh may be vindicated by the magistrates and town council although in the hands of a possessor *in bona fide*, on the grounds (1) that they are extra *commercium*, and (2) that never having been private property, but only held by the town council for the time being as trustees for the public interest under a perpetual trust, they were inalienable by them.<sup>3</sup> The Court of Session has authorised new town clerks of royal burghs to collate the record of sasines kept by their predecessors with the originals and to authenticate that collation,<sup>4</sup> and also to grant and sign certificates of registration and to complete the registration of deeds and instruments which had been presented for registration in the burgh register during the lifetime of the predecessor and up to the time of the appointment of the new town clerk.<sup>5</sup>

## SECTION 23.—ACCOUNTS AND CORPORATE PROPERTY.

### SUBSECTION (1).—*Accounts to be kept.*

**1217.** The T.C. Act, 1900,<sup>6</sup> contains elaborate provisions for the keeping and audit of accounts of the burgh funds and property, whether forming or arising from the common good, the assessments, or otherwise. Accounts of all property, heritable and moveable, vested in the council, shewing the nature of such property, and of all rates or assessments levied, and of all moneys received by or on account of the council, must be kept in books by the treasurer.<sup>7</sup> The council must yearly cause to be made out proper accounts of all moneys received and expended on account of the common good and revenue of the burgh, and on account of rates and assessments levied or collected, or money realised, received, or borrowed, under any Acts authorising assessments to be levied, or money to be uplifted or borrowed, for the year ending 15th May preceding, shewing from what sources such moneys have been received, and to what purposes they have been laid out and applied.<sup>8</sup>

<sup>1</sup> T.C. Act, 1900, s. 76.

<sup>2</sup> *Ibid.*, s. 75.

<sup>3</sup> *Mags. of Dumbarton v. University of Edinburgh*, 1909, 1 S.L.T. 51.

<sup>4</sup> *Cowper*, 1885, 12 R. 415.

<sup>5</sup> *Mags. of Elgin*, 1885, 12 R. 1136; *Hepburn*, 1905, 7 F. 484.

<sup>6</sup> Secs. 91–99.

<sup>7</sup> Sec. 91.

<sup>8</sup> Sec. 92.

1218. The accounts must exhibit a complete state, shewing (1) the common good and all other assets, and also the liabilities of the burgh, and the action taken during the year towards the extinction of such liabilities; (2) the amount of each branch of revenue and assessment, distinguishing receipts and arrears; (3) sums received or loans contracted for, annuities granted and sums received in consideration thereof, or on sale or alienation of property, distinguishing the same from ordinary revenue; (4) every sum paid and every sum remaining unpaid for or by reason of any expense incurred during the year for which such account shall be so made out, distinguishing the fixed or ordinary from the casual or incidental expenditure; (5) all cautionary obligations incurred by or on account of the burgh, distinguishing such as shall have been incurred during the year.<sup>1</sup>

SUBSECTION (2).—*Appointment of Auditor.*

1219. The appointment of an auditor must be made by the Secretary for Scotland annually, who, in case of dispute, shall on the application of either party fix the auditor's fee, and also fill vacancies where in consequence of death or otherwise auditors are unable to act.<sup>2</sup>

SUBSECTION (3).—*Audit and Approval.*

1220. The council must deliver the burgh accounts to the auditor as soon as may be after 15th May in each year, together with its books and vouchers, and the auditor must specially report in every case where he is of opinion that any statutory or other requirement with respect to the repayment or extinction of debt has not been observed, or that any debt is not being duly repaid.<sup>3</sup>

The yearly account, when audited, must be laid before a meeting of the council to be held not later than September in each year, the auditor's report be read, and the account, if and as approved by the council, be signed by the preses of the meeting and the town clerk, and deposited with the town clerk.

SUBSECTION (4).—*Publication.*

1221. The account or an abstract thereof, with the auditor's confirmation and special report, if any, must be printed, and any person assessed, or any elector, may inspect and examine such account at all reasonable times, without payment of any fee or reward for such inspection. The town council must forthwith transmit to the Secretary for Scotland, and shall also on the demand of any person assessed, or elector, on payment of such sum as the council, with the approval of the Secretary for Scotland, may fix, deliver to such person or elector, a copy of such account or abstract and report as printed. The Secretary for Scotland

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<sup>1</sup> Sec. 93.

<sup>2</sup> Sec. 94.

<sup>3</sup> Sec. 95.

may prescribe a form of abstract of the account in place of the abstract above mentioned, which, if he so determine, shall come in place of and render unnecessary a return of the receipts and expenditure of the town council in pursuance of the Local Taxation Returns (Scotland) Act, 1881.

SUBSECTION (5).—*Objections to Account.*

1222. Any ratepayer or elector dissatisfied with the account or any item therein may complain against the same by petition, specifying the grounds of objection, to the sheriff, who shall determine the same. The sheriff's decision is subject to the same right of appeal as in ordinary actions in the sheriff court. The petition to the sheriff must be made within three months of the date of the meeting of council at which the account is signed.<sup>1</sup>

SUBSECTION (6).—*Accounts of Charity under the management of the Town Council.*

1223. Where the town council or magistrates or any number of them are the sole trustees for any charity, foundation, or mortification, then, and in every such case, accounts relative to the same shall be kept distinct from the accounts relative to the common good, revenues, and assessments of the burgh, and the council shall yearly cause to be made out an account relative to such charity, foundation, or mortification, and all the provisions of the T.C. Act, 1900, relative to the preparation, submission to the council, and audit of the accounts relative to the common good and assessments of the burgh shall apply.<sup>2</sup>

SECTION 24.—POWERS OF THE TOWN COUNCIL.

SUBSECTION (1).—*General.*

1224. The powers belonging to the town councils of the various classes of burghs are not all alike; for it is enacted<sup>3</sup> that, subject to the provisions of the T.C. Act, 1900, the council and magistrates of each existing burgh shall have such and the like rights, powers, authorities, and jurisdiction as were possessed by the council or commissioners and magistrates of such burgh according to the existing law, and in the case of police burghs constituted after the commencement of that Act, they should have such and the like rights, powers, authorities, and jurisdiction as shall be possessed by the council and magistrates of police burghs in Scotland under the law for the time being.

1225. The town council of a burgh constituted by royal charter is, in its legal capacity as a corporation, a legal person capable of holding heritable and moveable estate, and of contracting debts and obligations independently of the position which it occupies as the authority for the execution of various legal powers under the authority of Parliament.

<sup>1</sup> Sec. 96.

<sup>2</sup> Sec. 97.

<sup>3</sup> T.C. Act, 1900, s. 7.

The burgh, as a legal person, is liable to sequestration under the bankruptcy statutes,<sup>1</sup> and the whole property of the burgh, so far as alienable, vests in the trustee in the sequestration, who distributes it among the creditors. But the right of the trustee does not extend to statutory trusts or to the power of imposing and levying rates which remain, notwithstanding the sequestration, vested in the corporation.<sup>2</sup> Corporations created by charter can borrow just as an individual can; those created by statute can only exercise such borrowing powers as are conferred upon them by statute, except in relation to the common good, if it exists.

SUBSECTION (2).—*Rating and Borrowing.*

**1226.** Burghs possessed of a common good may borrow on the security of such part of it as is alienable<sup>3</sup> as freely as any individual may do on the security of his own property. Statutory borrowing and rating are limited in manner and amount by the statutes which authorise them. General powers of borrowing for the purposes of the B.P. Act, 1892, are conferred by that Act,<sup>4</sup> and in cases where the maximum assessment has not been imposed, the town council may establish sinking funds in extinction of moneys borrowed for purposes for which the assessment has been imposed; or the town council may agree with lenders for yearly or half-yearly repayments in terms of the Act.<sup>5</sup> Bonds are granted in statutory form<sup>6</sup> and may be assigned by indorsement, also in statutory form.<sup>7</sup> A register of bonds and assignments of bonds is kept by the town clerk.<sup>8</sup>

**1227.** Town councils are empowered by the B.P. Act, 1903,<sup>9</sup> to borrow temporarily to meet the current expenses under any public general Act between the commencement of the financial year and the date when the assessment is received, or to provide temporarily for the payment of any expenses which the town council of any burgh are entitled to defray from moneys borrowed under any public general Act on the security of any assessment. The borrowing may be by way of temporary loan, or overdraft from a bank, or on temporary loan on deposit receipt from any person on the security of such assessment. Temporary loans in respect of the current expenses of any financial year must be repaid before the expiry of such year out of the assessment of such year; and other loans within six months after the expiry of the financial year; and all temporary borrowings must be shewn in the annual abstract of accounts.<sup>9</sup> The Public Works Loan Commissioners

<sup>1</sup> *Wotherspoon and Hope v. Mags. of Linlithgow*, 1863, 2 M. 348.

<sup>2</sup> *Leith Dock Comrs. v. Mags. of Leith*, 1897, 25 R. 126; 1899, 1 F. (H.L.) 65, per L. Watson.

<sup>3</sup> See para. 1252, *infra*.

<sup>4</sup> Sec. 374, as extended by the B.P. Act, 1903, ss. 47, 48, 49, and s. 104 (2) (v).

<sup>5</sup> B.P. Act, 1903, s. 48.

<sup>6</sup> B.P. Act, 1892, s. 376, for which a new section is substituted by the B.P. Act, 1903, s. 104 (2) (w).

<sup>7</sup> B.P. Act, 1892, s. 377.

<sup>8</sup> *Ibid.*, s. 378.

<sup>9</sup> B.P. Act, 1903, s. 49.



may make advances to town councils on the security of the rates, repayable within thirty years or less.<sup>1</sup> The council may establish sinking funds,<sup>2</sup> and issue stock or debentures under the Local Authorities Loans (Scotland) Acts.<sup>3</sup> See **BORROWING POWERS.**

SUBSECTION (3).—*Special Powers of Borrowing and Assessing.*

**1228.** The expenses attending the exercise of many of the ordinary powers of the town council are defrayed out of the burgh general assessment, but special powers of assessment are conferred in relation to special works. Thus, the council may borrow money for the construction of sewers both under the B.P. Acts<sup>4</sup> and under the Public Health (Scotland) Act, 1897,<sup>5</sup> for the erection of public halls and police buildings<sup>6</sup> and slaughter-houses,<sup>7</sup> for making streets, foot-pavements, introducing a water supply, lighting, and other public services, and may impose assessments therefor.

SUBSECTION (4).—*Power to Promote or to Oppose Bills and Provisional Orders.*

**1229.** The right to promote or oppose legislation, public or private, is one of great practical importance, especially to burghs not possessed of a common good. Where such exists, it may be possible to meet the expenses of the proceedings out of that fund, in cases where it would be illegal to charge the expenses against the burgh rates. But where no common good exists, and the expenditure is not a proper charge against the rates, those promoting or opposing the bills are personally liable for the expenses.

**1230.** In general, it is not competent to apply sums raised by statutory assessment in promoting or opposing public bills.<sup>8</sup> In regard to private bills, it is illegal to promote them out of the rates, except where authority is expressly given by statute. The power to oppose private legislation is on a somewhat different footing. The town council stands in the position of trustee in relation to the duties imposed upon it by statute, and it may be its duty to come forward and defend that trust at the expense either of the whole rates of the burgh or of a particular assessment which has been assailed.<sup>9</sup> It is provided by the

<sup>1</sup> B.P. Act, 1892, s. 379.

<sup>2</sup> *Ibid.*, s. 374; B.P. Act, 1903, ss. 45–49.

<sup>3</sup> 54 & 55 Vict. c. 34; 56 Vict. c. 8; 14 & 15 Geo. V. c. 36; 6 & 7 Geo. V. c. 69 (made permanent by 9 & 10 Geo. V. c. 99) (borrowing).

<sup>4</sup> B.P. Act, 1892, s. 236, as altered by the Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901 (1 Edw. VII. c. 34), s. 4, and extended by the B.P. Act, 1903, ss. 47, 49, 104 (2) (v).

<sup>5</sup> Sec. 139.

<sup>6</sup> B.P. Act, 1892, s. 315; B.P. Act, 1903, s. 104 (2) (r).

<sup>7</sup> B.P. Act, 1892, s. 278.

<sup>8</sup> *Wakefield v. Renfrew Comrs.*, 1878, 6 R. 259.

<sup>9</sup> *Leith Dock Comrs. v. Mags. of Leith*, 1897, 25 R. 126; 1899. 1 F. (H.L.) 65.

B.P. Act, 1903,<sup>1</sup> that without prejudice to any powers possessed by them under the existing law, town councils shall have the same powers of opposing bills and provisional orders as are conferred upon county councils by s. 56 of the L.G. Act, 1889, as read with the Private Legislation Procedure (Scotland) Act, 1899; and any expenses incurred by them in any year in the exercise of these powers may be defrayed in whole or in part from any assessment or from any two or more separate assessments levied by them in such year or in the following year, all as the town council may determine. Ratepayers who are entitled to an exemption from any assessment leviable by the town council have a right of appeal to the Secretary for Scotland against any such determination, and his decision is final. The L.G. Act, 1889,<sup>2</sup> confers on county councils the same powers of opposing bills in Parliament, and of prosecuting or defending any legal proceedings necessary for the promotion or protection of the interests of the county as are conferred by the Borough Funds Act, 1872;<sup>3</sup> but the consent of owners and ratepayers, necessary under the latter Act, is not required under the former; and the consent of the Secretary for Scotland is substituted for that of the Secretary of State or the Local Government Board. Sec. 56 of the L.G. Act, 1889, forbids a county council to promote bills or incur expense in relation thereto, save only a bill for confirming a provisional order made under the provisions of an Act of Parliament. Under the Borough Funds Act, 1872,<sup>3</sup> the governing body may apply "the borough fund, borough rate, or other the public funds or rates" under its control to the payment of the costs and expenses of promoting or opposing any local and personal bills in Parliament, or in prosecuting or defending any legal proceedings necessary for the promotion of the interests of the inhabitants of the district; and when there are several funds or rates available for that purpose, the governing body may determine out of which one or more of them such expense shall be payable.<sup>4</sup> But nothing in the Act authorises any governing body to promote any bill in Parliament for the establishment of any gas or water works to compete with any existing gas or water company established under any Act of Parliament. The powers contained in that clause do not apply where the promotion of or opposition to a bill by a governing body has been decided by a committee of either House of Parliament to be unreasonable or vexatious.<sup>4</sup> Nothing in the Borough Funds Act, 1872, is to alter or affect any special provision in any other Act for the payment of such cost and charges;<sup>5</sup> and the provisions of the Act do not extend to applications for any bill in Parliament for any object which could, for the time being, be attainable by provisional order.<sup>6</sup> Costs of promoting or opposing bills require the sanction of special meetings of the governing body and other consents in resolutions approved of by the Local Government Board or a principal Secretary of State as the case may be.<sup>7</sup> In

<sup>1</sup> Sec. 55.<sup>4</sup> 35 & 36 Vict. c. 91, s. 2.<sup>2</sup> Sec. 56.<sup>5</sup> *Ibid.*, s. 8.<sup>3</sup> 35 & 36 Vict. c. 91.<sup>6</sup> *Ibid.*, s. 10.<sup>7</sup> *Ibid.*, ss. 4 and 5.

the undernoted cases,<sup>1</sup> it was held that public bodies were not entitled to levy rates to be applied towards the payment of expenses incurred by them in the unsuccessful promotion of certain bills and provisional orders.

1231. A public body is entitled to defend its existence and its powers, when attacked,<sup>2</sup> and to pay the expenses of the defence out of the common good. But a corporation in lawfully defending its existence cannot lawfully pay the expenses of doing so out of rates dedicated by statute to a special purpose, *e.g.* the public health rate.<sup>3</sup>

#### SUBSECTION (5).—*Acquisition and Re-sale of Land.*

1232. General power has been conferred upon town councils "to purchase, or take in feu and build, or to lease such land and premises as shall be required, and to sell or feu and dispose of such lands and premises as may have become unfit or otherwise unnecessary for the purposes of" the Burgh Police Acts.<sup>4</sup> The section granting this power does not prescribe the manner in which it is to be exercised, and the special sections conferring powers for particular purposes must be referred to for the manner in which the acquisition of lands has to be carried out. Thus power is conferred of widening, enlarging, or otherwise improving streets, and to acquire land for that purpose, and to re-sell any parts thereof not required; and where houses are too closely built together, or have become waste and ruinous or insanitary, the town council may resolve to acquire lands or premises for the purpose of reserving them as vacant spaces, and may improve or take down the premises or otherwise dispose of them so as to improve the sanitary condition of the localities, or for the purpose of widening streets or closes, all at the charges of the general improvement rate. Such lands may be acquired, failing agreement, under the Lands Clauses Acts,<sup>5</sup> and appeal may be taken from the sheriff to the Secretary for Scotland, who may order further inquiry if he thinks fit, and deal with expenses.<sup>6</sup> Power to carry out improvement schemes is also conferred by the Housing of the Working Classes Act, 1890.<sup>7</sup> The purchase and taking of lands acquired thereunder is regulated by the Lands Clauses Acts as modified by the Second Schedule of the Act,<sup>8</sup> and compensation is fixed in terms of s. 21, all as modified by the Housing, Town Planning, &c., Acts, 1909 and 1919.

<sup>1</sup> *Stirling County Council v. Mags. of Falkirk*, 1912 S.C. 1281 (extension of burgh boundaries); *Farquhar & Gill v. Mags. of Aberdeen*, 1912 S.C. 1294 (new water supply); *Leith Dock Comrs., supra* (opposing extension of boundaries of Edinburgh); *Perth Water Comrs. v. M'Donald*, 1879, 6 R. 1950 (opposing extension of water supply area); *Wakefield v. Renfrew Comrs.*, 1878, 6 R. 259 (opposition to a public bill).

<sup>2</sup> *Att.-Gen. v. Mayor of Brecon*, 1878, 10 Ch. D. 205.

<sup>3</sup> *Leith Dock Comrs., supra*.

<sup>4</sup> *Ibid.*, s. 154; B.P. Act, 1903, s. 57, and s. 104 (2) (g).

<sup>5</sup> B.P. Act, 1892, s. 55 (5).

<sup>6</sup> B.P. Act, 1892, s. 154.

<sup>7</sup> 53 & 54 Vict. c. 70, amended by the Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. c. 41), and by the Housing, Town Planning, &c. (Scotland), Act, 1919 (9 & 10 Geo. V. c. 60).

<sup>8</sup> 53 & 54 Vict. c. 70, s. 20.



**1233.** Two or more contiguous burghs may acquire ground on which to build a hall and offices for the burghs, and may re-sell these subjects.<sup>1</sup> No special manner of acquisition is provided. Individual burghs may acquire ground for the erection of a public hall and offices, and a Court hall and police offices, with houses for police constables, or they may acquire a building already erected and use it for these purposes;<sup>2</sup> but this can only be done, after resolution, by special order, as defined in the B.P. Act, 1892.<sup>3</sup> The town council may also, by special order, and after resolution, purchase, rent, or otherwise provide land within burgh, or at a reasonable distance therefrom, to be used for recreation purposes or as a pleasure ground,<sup>4</sup> and similar powers are conferred by the Public Parks (Scotland) Act, 1878.<sup>5</sup> The councils of burghs having fewer than 5000 inhabitants may acquire land for providing a supply of water otherwise than by agreement, and instead of proceeding under the Public Health Acts, by presenting a petition to the sheriff for authority to put in force the provisions of the Lands Clauses Acts with reference to the acquisition of lands otherwise than by agreement.<sup>6</sup> It is provided by the Public Health Act, 1897,<sup>7</sup> that in the B.P. Act, 1892, and in the Lands Clauses Acts, so far as incorporated therewith, or authorised thereby to be put in force, the term "land" shall include water and any right or servitude to or over land or water. Local authorities may combine to provide or acquire a water supply.<sup>8</sup>

**1234.** The powers to acquire lands and premises conferred on a town council under the B.P. Act, 1892, s. 154, are extended to the purposes of extending, altering, or rebuilding bridges, and the expenditure incurred therefor, or for widening streets, is chargeable against the general improvement rate, or the assessment imposed for the purposes of the Roads and Bridges (Scotland) Act, 1878, or may be divided between such assessments in such proportions as the town council may determine.<sup>9</sup> Power is also conferred on town councils to acquire land and buildings<sup>10</sup> for the purpose of forming openings in hollow squares for ventilation.<sup>11</sup> Compensation may be awarded,<sup>12</sup> and the council may re-sell lands acquired for the said purpose, under certain restrictions.<sup>13</sup> Where the dean of guild has ordered the owner to round off the corner of a new building at the junction of two streets, the town council must make compensation to him, to be assessed, in cases of dispute, under the Lands Clauses Acts.<sup>14</sup>

**1235.** In all cases of disputed compensation under the B.P. Act, 1903, or any other public general Act whereby the town council of any burgh is entitled to acquire land compulsorily under the Lands Clauses

<sup>1</sup> B.P. Act, 1892, s. 57.<sup>2</sup> *Ibid.*, s. 315.<sup>3</sup> Sec. 306.<sup>4</sup> Sec. 307; as amended by B.P. Act, 1903, s. 104 (2) (g).<sup>5</sup> 41 & 42 Vict. c. 8.<sup>6</sup> B.P. Act, 1892, ss. 261, 262; Burgh Sewerage, Drainage, and Water Supply (Scotland) Act, 1901 (1 Edw. VII. c. 24), s. 6; B.P. Act, 1903, s. 57.<sup>7</sup> 60 & 61 Vict. c. 38, ss. 3, 124.<sup>8</sup> P.H. Act, 1897, s. 130, and see s. 12 as to "local authority."<sup>9</sup> B.P. Act, 1903, s. 104 (2) (g).<sup>10</sup> *Ibid.*, s. 73.<sup>11</sup> *Ibid.*, s. 69.<sup>12</sup> *Ibid.*, s. 70.<sup>13</sup> *Ibid.*, s. 75.<sup>14</sup> *Ibid.*, s. 62; also s. 57.



Acts, or whereby any compensation payable by a town council falls to be determined under the Lands Clauses Acts, it shall, unless both parties concur in the appointment of a single arbiter in terms of such Acts, be in the power of either party to apply to the Secretary for Scotland to appoint a single arbiter to determine the compensation to be paid, and it shall not be competent thereafter to have the same determined by arbiters, oversman, sheriff, or jury, acting under the Lands Clauses Acts. The said arbiter when appointed shall be deemed to be a sole arbiter within the meaning of the Lands Clauses Acts, and the provisions of these Acts with regard to arbitration shall apply accordingly. The sole arbiter must determine the amount of expenses in the arbitration, and his determination is final. The remuneration of the arbiter is fixed, failing agreement, by the Secretary for Scotland.<sup>1</sup> The expression "land" in this section includes water and any right of servitude to or over land or water.<sup>1</sup> The section does not apply where the public general Act authorising the acquisition of land or determining the compensation aforesaid makes special provision for the appointment of a single arbiter.<sup>1</sup>

#### SECTION 25.—BURGH COURTS.

##### SUBSECTION (1).—*General.*

**1236.** The burgh courts are the Burgh Police Court, the Licensing Court, the Court of Appeal in licensing matters, the Dean of Guild Court, and the Valuation Appeal Court.

##### SUBSECTION (2).—*Police Court.*

**1237.** (1) The burgh police court has jurisdiction in offences under the Burgh Police Acts, and in all offences, and to the extent, made competent to magistrates.<sup>2</sup> The forms, procedure, and extent of jurisdiction are regulated by the Summary Jurisdiction (Scotland) Act, 1908,<sup>3</sup> which has repealed the provisions of the B.P. Act, 1892, in that regard. The town council may appoint a stipendiary magistrate to officiate in the police court,<sup>4</sup> and also a clerk of the police court,<sup>5</sup> and a burgh prosecutor<sup>6</sup> and interim burgh prosecutor.<sup>7</sup> The court sits when required, and usually one magistrate constitutes the court.<sup>2</sup> The sheriff may be empowered to sit and act in the police court with consent of the magistrates on any special occasion or under any continuing arrangement.

**1238.** All forfeitures, penalties, fines, and expenses imposed by the magistrates and recovered are payable to the clerk of court or such other person as the magistrate may direct, and must be accounted for by him once every month or otherwise to the collector, as the town council may direct. The burgh prosecutor must intimate to the collector on the

<sup>1</sup> B.P. Act, 1903, s. 57.

<sup>2</sup> B.P. Act, 1892, s. 454.

<sup>3</sup> 8 Edw. VII. c. 65; Schedule A for repeal.

<sup>4</sup> See para. 1207, *supra.*; B.P. Act, 1892, s. 455.

<sup>5</sup> Sec. 460; para. 1206, *supra.*

<sup>6</sup> Sec. 461; para. 1204, *supra.*

<sup>7</sup> Sec. 462.

first Monday of each month the amount of the forfeitures, penalties, and fines imposed in the previous month, stating the amount thereof recovered.<sup>1</sup> Forfeitures, penalties, and fines are applied in payment of the expenses incurred in alimentering prisoners detained in custody in the police office or station houses, any deficiency required for that purpose being made up out of the burgh general assessment, and any surplus being applied to the same purposes as that assessment.<sup>2</sup>

#### SUBSECTION (3).—*Burgh Licensing Courts.*

**1239.** For each burgh, being a county of a city, and for each royal, parliamentary, or police burgh containing a population of or exceeding 7000, and for each burgh under 7000 but of or exceeding 4000, the magistrates of which have power to grant certificates under the Licensing acts existing when the Licensing (Scotland) Act, 1903, came into force, a separate licensing court is established, consisting of the magistrates of the burgh.<sup>3</sup>

#### SUBSECTION (4).—*Licensing Court of Appeal.*

**1240.** For the purpose of hearing appeals and applications for confirmation of new certificates there is a court of appeal, one-half of the members of which is elected by the justices of the peace from their own number, and the other half consists of burgh magistrates. For each burgh, being a county of a city, a separate court of appeal is composed of the members of the licensing court and an equal number of justices for the county of the city; for each royal, parliamentary, or police burgh (not being a county of a city) of or over 20,000 inhabitants there is a separate court of appeal consisting of equal numbers of county justices and magistrates of the burgh.<sup>4</sup>

#### SUBSECTION (5).—*Dean of Guild Court.*

**1241.** This court, which deals principally with the examination and sanctioning of plans relating to building operations, varies in constitution in different burghs, according as it has been established under charter or set of the burgh or Act of Parliament. In most burghs it is constituted under the B.P. Act, 1892, which provides that the court shall consist of a dean of guild or the provost, and not less than two councillors, who may be magistrates and shall be elected annually.<sup>5</sup> [See DEAN OF GUILD.]

#### SUBSECTION (6).—*Valuation Appeal Court.*

**1242.** This court hears appeals against valuations of lands and heritages in the burgh, and consists either of the whole town council, or of a committee of the council of not less than seven or more than fifteen members.

<sup>1</sup> B.P. Act, 1892, s. 497.

<sup>2</sup> *Ibid.*, s. 498.

<sup>3</sup> Licensing (Scotland) Act, 1903, s. 2.

<sup>4</sup> *Ibid.*, s. 4.

<sup>5</sup> B.P. Act, 1892, ss. 202, 203.

## SECTION 26.—BURGESSES.

**1243.** A burgh is a member of the corporation of a burgh who may be admitted as such, either in virtue of the charter of erection of the burgh, or by birth, being the son of a burgh, or by serving an apprenticeship to a burgh, or by marrying the daughter of a burgh, or by election by the magistrates of the burgh. There were three kinds of burgesses, *i.e.* burgesses *in sua arte*, who were members of one or other of the corporations; burgesses who were guild brothers; and a third class, who were simply burgesses, and neither guild brothers nor members of any corporation.<sup>1</sup> On admission the burgh takes an oath of fidelity to the Crown, and of faithful obedience to the provost and bailies of the burgh, and pays certain dues, upon which he receives an extract of his admission from the town clerk.<sup>2</sup> Burgesses had, with the guild brethren, the exclusive privileges within the burgh of trade and manufacture, except on market-days, when traders and manufacturers in the county or unfreemen in the burgh might sell their goods. All exclusive trading privileges and rights are now abolished,<sup>3</sup> but the guilds and trades corporations still exist, with power to elect their own deacons and officers for managing their affairs.

**1244.** By the T.C. Act, 1900, every person in Scotland of full age, liable to be rated for relief of the poor, who at the term of Whitsunday 1900, or any succeeding term of Whitsunday in any year, has occupied any house, warehouse, counting-house, shop, or other building within any burgh in which there are burgesses during the whole of that year, and the whole of the two preceding years, and who during the time of such occupation shall have been an inhabitant householder within the said burgh, and who shall have been rated in respect of such premises so occupied within the burgh to all rates made for relief of the poor of the parish wherein such premises are situated during the time of his occupation, and who shall have paid on or before the last term of Whitsunday all such rates, together with all burgh rates, as shall become payable within six calendar months before the said last term of Whitsunday, shall, subject to certain conditions, be a burgh of such burgh. Such person only remains a burgh so long as he occupies the premises, and is rated and pays rates as above stated within the burgh. The premises in respect of the occupation of which any person shall have been so rated need not be the same premises, or in the same parish, but may be different premises in the same parish or different parishes. No person, however, being an alien, and no person who, within twelve calendar months next before the last term of Whitsunday, shall have received parochial relief or any pension or charitable allowance from the town council revenues of such burgh, or from any corporate body within the same, shall be held to be a burgh so long as he continues to receive such pension or charit-

<sup>1</sup> *Hog v. Flockhart & Buntin*, 1743, Mor. 1928.

<sup>2</sup> As to stamp duty, see 54 & 55 Vict. c. 39, s. 1, Schedule I.

<sup>3</sup> 9 & 10 Vict. c. 17, s. 1.



able allowance ; but no person shall be disqualified by reason that any child of his shall have been admitted and taught within any endowed school.

**1245.** It is expressly provided that nothing contained in the T.C. Act, 1900, shall interfere with any existing law or legal usage by which burgesses are created and admitted in any burgh, or give or imply any title to or interest in any merchant's house or trader's house, or any patrimonial lands, common or other properties, funds or revenues, of any of the guilds, crafts, or incorporations of the burgh, or to or in any burgess acres, or any grazing rights connected therewith, or any modification or benefactions for behoof of the members of such guilds, burgesses of guilds, crafts, or incorporations, or of their families, or any right or management thereof, or any membership in any of the said guilds, burgesses of guild crafts, or incorporations, or of such burgess acres. The widows and children of burgesses admitted under the T.C. Act, or any of the Acts thereby repealed, and who may die during the period of their burghship, shall have and enjoy all the rights and privileges which the widows and children of burgesses created or admitted in any other manner now enjoy by the law and practice of Scotland.

**1246.** A female may be a burgess, as the terms are "every person of full age," which does not exclude women. The town clerk is the custodier of the register of burgesses. In virtue of their powers to admit burgesses it has become customary for the magistrates in the larger towns to admit persons of distinction to the position of honorary burgesses. This is what is known as "conferring the freedom of the burgh." The names of such honorary burgesses are entered in the burgess list ; but such burgesses are not entitled, when not resident or carrying on business within the burgh, to exercise the municipal franchise or be elected to the town council.

**1247.** The title to complain of misapplication of the common good of a royal burgh is vested at common law in the Crown exclusively, but certain statutory checks on illegal acts of the town council have been introduced and limited rights of intervention conferred on individual burgesses or classes of burgesses. Burgesses may take action where their individual patrimonial rights are threatened.<sup>1</sup>

#### SECTION 27.—BURGESS OR BURGH ACRES.

**1248.** Certain small patches of land of one or more acres, and sometimes less, lying either within or in the neighbourhood of royal burghs, and frequently forming part of the burgh-muir, which were usually feued out to and occupied by burgesses or their dependants resident in the burgh, were called burgess or burgh acres. Thus in the Records of the City of Edinburgh, 24th April 1511, sasine is given to a burgess of "a piece of waste land towards the burgh loch of the said burgh, the half of

<sup>1</sup> See "Common Good," para. 1250, *infra*.



an acre of land for houses and buildings to be erected thereon between the lands of . . . . on the east and the lands of . . . . on the west. Also of one piece of arable land annexed thereto, lying towards the south, containing two acres and the half of an acre arable land, lying with the larger measure, because that piece is in part barren, and not so fertile and fruitful as the other lands lying thereabout. For every tenantry in the said muir should contain in whole three acres of land only to be built and cultivated, unless there be a reasonable cause of barrenness and unfruitfulness, according to the tenor of the charter to be made thereupon under the common seal of the burgh." On the same day sasine was given to fifteen other persons of similar acres, and numerous instances of the same kind occur throughout the Records. The controlling power and right of management of these, for the benefit of the community and burgesses, is vested in the magistrates and council, subject always to and consistent with the rights and titles of the respective parties.<sup>1</sup> A burgess under the Act 39 & 40 Vict. c. 12, did not acquire any right or interest in the properties, funds, or revenues of the guilds, crafts, or incorporations of the burgh, or to or in any burgess acres or grazing rights connected therewith. The Act of Parliament 1695, c. 23, for the division of runridge lands, excludes burgh acres from the effects of the statute. This exception, however, relates only to royal burghs, and does not extend to burghs of barony.<sup>2</sup>

#### SECTION 28.—SERVITUDES.

**1249.** Certain servitudes are enjoyed chiefly by the inhabitants of royal burghs independently of their possessing property in the burgh. These servitudes, which are of a somewhat anomalous kind, inasmuch as they are in a sense personal servitudes not attached to a dominant tenement or *prædium*, unless indeed the burgh itself is the dominant tenement, are sustained in the persons of the magistrates for the benefit of the inhabitants of the burgh. The servitudes are of the same nature as public rights of way, although the public at large are not entitled to these privileges. They are constituted by use and wont for the prescriptive period over the lands of neighbouring proprietors, or by express reservation in a feuing charter, and it has been stated judicially that it is "not anomalous or unusual for the magistrates of a burgh to be the dominant heritors of a rural servitude for the use of the inhabitants of the burgh."<sup>3</sup> Instances of such servitudes are bleaching,<sup>4</sup> golfing,<sup>5</sup> casting and winning slate,<sup>3</sup> pasture,<sup>3</sup> "walking and making parades" on a road bounded by the sea.<sup>6</sup> It was thought that the inhabitants

<sup>1</sup> *Mags. of Lauder v. Spence*, 1821, 1 S. 17 (N.E. 15).

<sup>2</sup> *Douglas v. Inglis*, 22nd Jan. 1777, Bro. Supp. 581; Bell, Prin., s. 1099.

<sup>3</sup> *Murray v. Mags. of Peebles*, 8th December 1808, F.C.

<sup>4</sup> *Sinclair v. Town Council of Dysart*, 1779, Mor. 14519; aff. 1780, 2 Pat. 554; *Home v. Young*, 1846, 9 D. 286.

<sup>5</sup> *Cleghorn v. Dempster*, 1805, Mor. 16141; 1813, 2 Dow, 40.

<sup>6</sup> *Mags. of Dundee v. Hunter*, 1843, 6 D. 12; 1868, 20 D. 1067.

of a burgh of barony "being only a semi-incorporation" could not prescribe such servitudes;<sup>1</sup> but in *Smith v. Police Comrs. of Denny and Dunipace*<sup>2</sup> it was held by the House of Lords that the inhabitants of an unincorporated town could acquire by prescriptive user a servitude of drawing water, and it was conceded in argument that the inhabitants of a burgh of barony could acquire servitudes by prescription for their common benefit.

## SECTION 29.—COMMON GOOD.

### SUBSECTION (1).—*Nature and Origin.*

**1250.** The common good of a burgh consists of the entire property of the burgh, which is held by the corporation for behoof of the community. In ancient times it was composed of lands granted by the Crown, of the fines or impositions known as the issues of the Court, and of taxes or imports on trade, levied as tolls, petty customs, or dues. The common good may be alienable and liable for the payment of debts, or inalienable and not subject to encumbrance. The part of it which can be sold consists of lands, houses, mills, fishings, feu-duties, and other descriptions of heritage, which are generally situated within the royalty or in its immediate neighbourhood. The lands, mills, and fishings are usually let for the periods and under the conditions common to the district, while houses, according to ordinary practice in towns, are let for a year, or sometimes for a longer period where a higher rent can be obtained. The property dedicated by grant, statute, or otherwise to the special use and behoof of the burgh, having been granted to enable the municipality "to sustain the dignity of the burgh and enable the magistrates and council to discharge properly their duties to the public—judicial and ministerial,"<sup>3</sup> is regarded as *extra commercium* and inalienable. This class of property usually consists of public lands or buildings, such as churches, town halls, market-places, and common greens or grounds set apart for the general use or enjoyment of the inhabitants, the right to levy the petty customs and other the like imports and the proceeds thereof. These are held by the corporation in trust for behoof of the community, and are inalienable and not liable to be attached by the diligence of creditors of the burgh. The revenues arising from these different kinds of property, including the customs, casualties, entry-money of burgesses, etc., fall into and form part of the common good.

**1251.** This corporate property, in the case of a royal burgh, having been derived from the Crown, the Crown possessed over it a right of oversight and control, entitling it to intervene to prevent or redress any abuse or malversation on the part of the town council. The right of

<sup>1</sup> Bell, Prin., s. 993; *Feuars of Dunse v. Hay*, 1732, Mor. 1824; *Dyce v. Hay*, 1849, 11 D. 1266; aff. 1852, 1 Macq. 305.

<sup>2</sup> 1879, 6 R. 858; aff. 1880, 7 R. (H.L.) 28, per L. Blackburn at p. 38.

<sup>3</sup> *Kerr v. Mags. of Linlithgow*, 1865, 3 M. 370, per L. Deas.

intervention is exclusive at common law, and, apart from special procedure authorised by statute, no action at law directed against the council's administration is competent at the instance of individual burgesses.<sup>1</sup> The administration of the burgh funds and property was in most burghs improvident and corrupt, and repeated attempts were made to improve it, but with scant success, by a series of statutes,<sup>2</sup> the most elaborate of which was Sir William Rae's Act<sup>3</sup> in 1822. That Act was repealed by the T.C. Act, 1900,<sup>4</sup> which placed the administration of the common good and burgh funds on a better footing and under a stricter audit.

#### SUBSECTION (2).—*Restraints against Alienation.*

**1252.** The Court has frequently restrained magistrates from alienating any part of the common good which is considered inalienable. Thus it has been held that no building could be erected on the streets,<sup>5</sup> that the magistrates could not feu a part of the street,<sup>6</sup> or sell the patronage of a church forming part of the common good of the burgh,<sup>7</sup> or feu ground which has been reserved for the common use of the inhabitants for bleaching clothes<sup>8</sup> and the sport of golf, or apply part of a similar public ground to widen a street,<sup>9</sup> or take down the steeple of the property of a burgh without judicial authority,<sup>10</sup> or deprive gardeners of their right to hold fairs and markets on ground assigned for that purpose;<sup>11</sup> nor can a creditor sell the jail and town house with its steeple and bell, or the petty customs of a royal burgh,<sup>12</sup> or a right of fishing belonging to the individual inhabitants of a burgh which had never been a source of patrimonial gain.<sup>13</sup> It has also been held that the petty customs leviable by the magistrates are not liable for the debts of the burgh, but ought to be applied exclusively in defraying its proper municipal expenses;<sup>14</sup> that neither the petty customs nor the rent payable by the tacksmen thereof can be alienated or attached by creditors, and that there is no distinction in this respect between the actual right to levy the customs and the proceeds thereof, or between the customs necessary for the maintenance of the public office and the surplus not required for that purpose, the measure of the sum which is required for public duties

<sup>1</sup> *Burgesses of Inverury v. The Magistrates*, 14th Dec. 1820, F.C.; *Conn v. Mags. of Renfrew*, 1906, 8 F. 905.

<sup>2</sup> 1491, c. 19; 1593, c. 39; 1693, c. 45.

<sup>3</sup> 3 Geo. IV. c. 91.

<sup>4</sup> 63 & 64 Vict. c. 49.

<sup>5</sup> *Mags. of Montrose v. Scott*, 1762, Mor. 13175.

<sup>6</sup> *Young v. Dobson*, 2nd Feb. 1816, F.C.

<sup>7</sup> *Wallace v. Mags. of St. Andrews*, 1824, 2 S. 758.

<sup>8</sup> *Grahame v. Mags. of Kirkcaldy*, 1879, 6 R. 1066; *Home v. Young*, 1846, 9 D. 286.

<sup>9</sup> *Adams v. Mags. of Glasgow*, 1868, 40 S.J. 524; 5 S.L.R. 591; and see *Paterson v. Mags. of St. Andrews*, 1881, 8 R. (H.L.) 117.

<sup>10</sup> *Crawford v. Mags. of Paisley*, 1870, 8 M. 693.

<sup>11</sup> *Blackie v. Mags. of Edinburgh*, 1884, 11 R. 783; *Murray v. Mags. of Forfar*, 1893, 20 R. 908.

<sup>12</sup> *Phin v. Mags. of Auchtermuchty*, 1827, 5 S. 690.

<sup>13</sup> *Beck v. Mags. of Lochmaben*, 1839, 1 D. 1212.

<sup>14</sup> *Mags. of Lochmaben v. Beck*, 1841, 4 D. 16.



being held to be the amount which the Crown has provided for that purpose.<sup>1</sup>

SUBSECTION (3).—*Powers of Alienation.*

**1253.** On the other hand, the magistrates may feu, sell, or lease for adequate consideration the common good, in so far as not dedicated inalienably to specific uses. The town council must cause all feus, alienations, or tacks for more than five years, of any heritable property of the burgh, or vested in the council, so far as forming part of the common good, to proceed by public roup under pain of nullity. Where reduction was sought of a feu and tack of Leith Links for two periods of nineteen years, on the ground of these being alienations of the common good granted for an inadequate consideration and not by public roup, the Court repelled the reasons, but afterwards allowed a proof before answer, indicating that if the reasons were sufficient the reduction would succeed.<sup>2</sup> It has been held that the magistrates are entitled to sell a superiority forming part of the common good and apply the price in payment of debt;<sup>3</sup> but a previous Act of Council would undoubtedly be needed for such a sale, as it has been to authorise a feu of burgh property,<sup>4</sup> and it cannot be done privately.<sup>5</sup>

**1254.** So long as they do not act *ultra vires*, the magistrates may grant bonds affecting the burgh and its funds, for which neither the granters nor their heirs are liable personally, but which transmit against the succeeding council and the community.<sup>6</sup> The magistrates and council cannot discharge a bond granted to the burgh without payment of the sum or adequate consideration.<sup>7</sup> If a debt be contracted without a previous Act of Council setting forth the cause of incurring, the magistrates who signed the bond must relieve the burgh, unless they can shew that the money was applied for the burgh.<sup>8</sup> It is provided by the T.C. (Scotland) Act, 1900, s. 90: "It shall not be lawful for the council of any burgh to contract any debt, grant any obligation, make any agreement, or enter into any engagement, which shall have the effect of binding them or their successors in office, unless a resolution of council or of a committee duly authorised to pass such resolution shall have been previously made in that behalf, or unless the same has been authorised by some person authorised by standing order of the council to do so, and any such contract, obligation, agreement, or engagement made or entered into without such authority shall be void and null as against the common good, property, and assessments of the

<sup>1</sup> *Kerr v. Mags. of Linlithgow*, 1865, 3 M. 370.

<sup>2</sup> *Mags. of Edinburgh*, 1690, Mor. 2496; see also *M'Ghie*, 1735, Mor. 2501.

<sup>3</sup> *M'Dowal v. Mags. of Glasgow*, 1768, Mor. 2525.

<sup>4</sup> *Mags. of Selkirk v. Clapperton*, 1828, 6 S. 955.

<sup>5</sup> *Stewart v. Mags. of Paisley*, 1822, 1 S. 261 (N.E. 246).

<sup>6</sup> *Bankt. iv.* 19, 2; *Bowry v. Wilson*, 7th Feb. 1695, Fount.; *Burgh of Renfrew v. Murdoch*, 1892, 19 R. 822.

<sup>7</sup> *Mags. of Glasgow v. Barns*, 1685, Mor. 2515.

<sup>8</sup> *Ross v. Mags. of Tain*, 1711, Mor. 2499; *Archbishop of St. Andrews v. Mags. of Glasgow*, 1685, Mor. 2496.



burgh or the succeeding council thereof, without prejudice nevertheless to the personal liability and responsibility of the persons by whom the same may have been made or entered into."

#### SUBSECTION (4).—*Rights of Challenge.*

**1255.** Burgesses of royal burghs are not entitled to challenge judicially the general administration by the corporation of the affairs of the burgh, or bring the magistrates and council into a general accounting regarding these. This is well settled by a long train of old decisions. Burgesses may, however, sue the magistrates and council for the vindication of their individual patrimonial rights, and to prevent specific acts of maladministration of the property of the burgh or its revenues.<sup>1</sup> The magistrates and council are, however, not only entitled but bound to continue to contribute annual payments out of the common good for a burgh school, which they had been in the habit of making for a long series of years, notwithstanding the passing of the Education Act.<sup>2</sup>

**1256.** When the provisions of the B.P. Act, 1892, are in operation in any burgh possessed of any free income arising from the common good, after deduction of interest for debts and the necessary annual outgoings of the burgh, the town council may contribute therefrom such a reasonable proportion towards the purposes of the Act (*e.g.* assessments) as the town council, having due regard to the extinction of the capital of such debt, shall think just.<sup>3</sup>

**1257.** A minority of a town council may challenge an act of the council either alienating or acquiring property, or in regard to the administration of the public property, on the ground either that the council is exceeding its powers, or that what is proposed to be done is plainly against the interests of the community which the council represents. There must, however, be clear excess of power, as the Court will not lightly interfere with the discretion of the magistrates and council.<sup>4</sup> So likewise the magistrates and council of a burgh, on similar grounds, may competently challenge the acts of their predecessors, in so far as these irregularly alienate or affect the common good, or incur liabilities on the burgh or community.<sup>5</sup>

#### SUBSECTION (5).—*Council as Trustees.*

**1258.** As already stated, the magistrates and council are merely trustees holding the common good and property of the burgh in trust

<sup>1</sup> *Johnston v. Mags. of Edinburgh*, 23rd July 1735, Elchies, *voce* Burgh Royal, No. 4; see also *Mags. of Lauder v. Spence*, 1821, 1 S. 17, and cases there cited; *Keiller v. Mags. of Dundee*, 1886, 14 R. 191; *Kemp v. Corporation of Glasgow*, 1920 S.C. (H.L.) 73.

<sup>2</sup> *School Board of Greenock v. Mags. of Greenock*, 1890, 17 R. 969.

<sup>3</sup> B.P. Act, 1892, s. 358.

<sup>4</sup> *Baxter*, 1772, Br. Supp. *voce* Title to Pursue, vol. v. p. 629; *Aitchison v. Mags. of Dunbar*, 1836, 14 S. 421; *Nicol v. Mags. of Aberdeen*, 1870, 9 M. 306.

<sup>5</sup> *Mags. of Glasgow v. Barns*, 1685, Mor. 2515; *Mags. of Pittenweem v. Alexanders*, 1774, Mor. 2527; *Mags. of Selkirk v. Clapperton*, 1828, 6 S. 955.

for behoof of the corporation, and are only entitled to deal with it for the purposes of the trust. These purposes are public objects within the scope of municipal administration; and while the Court will allow a fair discretion in the administration of the corporation funds, it has insisted that what is done must be done unequivocally for the benefit of the burgh as a whole, and not for any particular part or limited class of persons. The primary purposes of this trust are only what can be fairly classed under municipal administration, and it is very doubtful how far expenditure beyond this would be justified. In England, it has been held that the purchase of a gold chain was an illegal expenditure of the burgh funds which could not be sustained.<sup>1</sup> Probably a similar judgment would be pronounced if such a proceeding were challenged in Scotland. As to the position of the common good and burgh property, when a burgh has adopted the Burgh Police Acts or has been extended under the B.P. Act, 1892, s. 11, see above.

### SECTION 30.—CONVENTION OF BURGHES.

**1259.** The General Convention of Royal Burghs of Scotland, “a body of an anomalous character, partaking in some respects of corporate qualities,”<sup>2</sup> is a very ancient institution recognised by royal charters and Acts of Parliament.<sup>3</sup>

**1260.** From early times the royal burghs were in use to consult together and take united action in matters relating to their welfare. In the twelfth century representatives of four leading burghs met under the presidency of the Lord High Chamberlain of Scotland as a sort of court of appeal to deal with burghal and commercial matters. This body was known as the Court of the Four Burghs, and the burghs were Edinburgh, Stirling, Berwick, and Roxburgh. The last two burghs having been seized by the English, Lanark and Linlithgow took their places in 1368 “Sua lang as they are detained and halden by Inglishmen.” In the year 1405 the Court of the Four Burghs “decreited that twa or three sufficient burgesses of ilk ane of the Kings Burghs, upon the south side of the Water of Spey, having sufficient Commission, compeir yearlie to the Convention of the Foure Burghes to trait, ordaine, and determe upon all things concerning the utilitie of the common well of all the King’s Burghs, their liberties and court.” In a charter granted by James II. in the year 1454 this body is described as the “Parliament of the Four Burghs,” and it was empowered “to do and exercise all and singular which in any way in the Court of Parliament, according to the laws, statutes and customs of burghs are treated upon considered and finally determined.” Legislation followed, and the Act of the Parliament at Edinburgh, 1st October 1487, “That certane commissioneris of borrowis convene in ilk yere,” enacted “Alsa it is statut and ordanit be the hale

<sup>1</sup> *Attorney-General v. Mayor of Batley*, 1872, 26 L.T. (N.S.) 392.

<sup>2</sup> *Convention of Royal Burghs v. Cunningham*, 1839, 1 D. 1077; 1842, 1 Bell, App. 628.

<sup>3</sup> See *The Convention of Royal Burghs of Scotland*, by Pagan, Glasgow, 1926.

thre estates that yerely in tyme to cum certane commissionaris of all borrowis baith south and north convene and gadre togidder . . . with full commissioun and thair to comoun and trete apoun the welefare of merchandis the gude Rewle and statutis for the commoun profit of borowis and to provide for Remede apoun the scaith and Iniuris sustenit within burowis. . . .”<sup>1</sup> This representative body still retained the name of “The Parliament of the Four Burghs,” and for a time was presided over by the Lord Chamberlain, and its meetings became known as “conventions.” It probably was the “third estate” of the Realm of Scotland, and the last remnant of the Parliament of Scotland. Subsequent statutes extended and confirmed the privileges of the royal burghs.

**1261.** The Convention consists of commissioners or delegates appointed by all the royal burghs in Scotland, to administer the affairs and exercise the powers of the Convention. “Since the middle of the sixteenth century, this assembly of representatives from all the burghs of the kingdom has been annually held, and its proceedings have been conducted with much regularity. As a deliberative body, its attention has been frequently directed to the state of national commerce and manufacture; and where the measures which have been deemed expedient have exceeded the limits of that power of more minute regulation which it has often assumed, the Convention has been frequently instrumental in obtaining Acts of Parliament for the promotion of the objects in view. In questions and controversies between different burghs, it has frequently exercised a sort of judicial authority, or power of arbitration; and in the administration of particular burghs, besides adjusting the forms and modes of electing their magistrates and councils, it has been not unfrequently appealed to for the purpose either of checking or of affording its sanction to those acts which have proved fatal to the original endowments of so many of them. As an executive body, its primary function has been to apportion their respective shares of the general land tax or cess, of which one-sixth part is imposed on the ‘estate of burghs,’ but from a small portion of which they have been relieved by towns of an inferior class, to which the exclusive privileges of trade have been communicated. And lastly, the Convention has long exercised the power of imposing additional taxes on the burghs royal, for the purpose of aiding the smaller or more indigent of the class in the erection of harbours, and other public works for the promotion of their commercial prosperity.”<sup>2</sup>

**1262.** The Convention sues and is sued in name of its agent. Through long practice, the Lord Provost of Edinburgh presides over the meetings when these are held in Edinburgh, although he may not be a member. He has a casting but no deliberative vote, unless he be one of the

<sup>1</sup> C. 111 [in part rep. 6 Edw. VII. c. 38 (S.L.R.)]. See also the statutes of James VI. 1578, c. 64; 1581, c. 119; 1607, c. 6; and an unprinted Act of Parliament passed in the year 1607 (refs. to 12 mo. ed.).

<sup>2</sup> Report on the Municipal Corporations of Scotland, 1835.



representatives of the burgh. When the Convention meets in other burghs, which it occasionally does, the Lord Provost or Provost of that burgh is appointed preses for the time, and he presides over the meetings. There is a roll of the burghs which regulates their precedence, but the Convention has repeatedly held that in the absence of the preses it has the right to select its chairman, irrespective of the precedence of the burghs.

**1263.** By the Acts 42 & 43 Vict. c. 27, and 58 Vict. c. 6, the Convention was empowered to admit parliamentary and police burghs in Scotland upon such terms as might be agreed upon. These burghs are represented in the Convention by commissioners and assessors, similarly to the royal burghs of Scotland. The Convention is thus now composed of representatives from all the burghs in Scotland which choose to elect such. The representation at present is one commissioner from each burgh in the Convention, except in the cases of Edinburgh and Glasgow, each of which sends two. Each burgh also sends an assessor (Edinburgh and Glasgow each sending two assessors), who are only entitled to vote in the absence of the commissioners from their burghs. The Convention is represented on the Central Midwives Board for Scotland and on the Board of the National Library of Scotland (formerly the Advocates' Library).<sup>1</sup> All the Scots burghs are now represented on the Convention.

**1264.** The business of the Convention is transacted at an annual meeting and at special meetings of the representatives of the burghs. When the business at the annual meeting is concluded the meeting is dissolved, not adjourned; and in the interval between this and the next annual meeting the interests of the burghs are attended to by a committee of the Convention, called the Annual Committee, composed of all the representatives who may choose to attend, which meets as occasion requires. The money required for expenditure is voted annually, and is raised by an assessment upon the burghs under the authority of the statute of James III., and by contributions from the parliamentary and police burghs.

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<sup>1</sup> 5 & 6 Geo. V. c. 91, ss. 3-5, 12, 13, 15, 24.



# BURIAL AND CREMATION.

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## SECTION 1.—INTRODUCTION.

**1265.** As Scots law places no restriction on the method of disposing of the bodies of the dead save those involved in sanitary law and the law of nuisance, the right of burial falls within the uses to which anyone may dedicate his property. The relatives of the deceased are free to determine the place and manner of sepulture, subject to certain statutory provisions.<sup>1</sup> But from considerations originally of a sacred character, now mainly sanitary, it has been recognised as a public necessity that facilities for burial should be brought within the reach of all, and accordingly the duty was imposed on parochial authorities of providing kirkyards or burial-grounds, in which the public of the parish should have the right of sepulture. There is no law requiring that parishioners be buried in their own parish, as there was in canon law.<sup>2</sup> But the remains are sacred wherever they are interred; and so a grave is protected against disturbance, at least until “the process of disintegration is complete.”<sup>3</sup> There are two exceptions to this rule: (1) If those having the management of a public burial-ground are compelled to disturb the grave from considerations of necessity or high expediency;<sup>4</sup> or (2) if the burial was in ground in which there was no right of burial;<sup>5</sup> in these cases disinterment appears to be permissible, on condition that the remains be reinterred with all decency and respect. In other cases authority to disinter and reinter may, on cause shewn, be obtained from the Court of Session or (more usually) from the sheriff.<sup>6</sup>

<sup>1</sup> Statutory provisions as to burial, para 1290, *infra*.

<sup>2</sup> *Kirk Session of Duddingston v. Halyburton*, 1832, 10 S. 196.

<sup>3</sup> *Earl of Mansfield v. Wright*, 1824, 2 Sh. App. 104.

<sup>4</sup> *Steel v. Kirk Session of St. Cuthbert's Parish*, 1891, 18 R. 911.

<sup>5</sup> *Officers of State v. Ochterlony*, 1823, 2 S. 437; *affd.* 1825, 1 W. & S. 533.

<sup>6</sup> *Mitchell, Petr.*, 1893, 20 R. 902.

## SECTION 2.—PRIVATE BURYING-PLACES AND CEMETERIES.

**1266.** There is no restraint on a person setting apart a portion of his ground as a family burying-place, or a mausoleum, unless it can be shewn to involve injury to public health, or to be a nuisance to neighbouring proprietors.<sup>1</sup> Such a burying-place is not a burial-ground in the sense of the Burial-Grounds Act, 1855,<sup>2</sup> so as to require the consent of owners of houses within a hundred yards of it.<sup>3</sup> Scots law (differing from the Roman law) does not recognise every place used for burial as *res religiosa* and incapable of commerce.<sup>4</sup> A private burying-place of this description may be dealt with by the owner like any other private property, with this sole condition, that, except for some good cause, the grave shall not be disturbed until the process of disintegration is complete.<sup>5</sup> In the *Duddingston* case,<sup>6</sup> declarator was sought that no other persons than the heritors and kirk session “were entitled to establish within the parish a place of common sepulture.” Declarator was refused, Lord Mackenzie stating that there is no statute, decision, or dictum to suggest any illegality in the formation of private cemeteries, or letting out the use of them for price or hire. In an attempt to interdict the formation of a cemetery on the ground of nuisance, the case was remitted to a jury.<sup>7</sup>

**1267.** The rights of parties contracting as to the privilege of sepulture in a cemetery are regulated by the ordinary law of contract, they being free to make what bargain they please. The ordinary stipulation is for “a right to the exclusive use of a piece of ground for a burial-place, tomb, or grave, either in perpetuity or for a limited period.”<sup>8</sup> When the terms of the contract are left to implication, they include the following :<sup>9</sup> (1) The lairholder does not acquire an absolute right of property. This remains with the persons feudally vested in the ground. But the lairholder acquires the right to use in perpetuity the allocated lair for the sole purpose of sepulture. (2) The cemetery is held to be dedicated exclusively as a burial-ground. The lairholder can restrain attempts to make any other use of it, or to erect any building in it foreign to the purpose of a burial-ground.<sup>10</sup> (3) Fair and reasonable fees may be charged for interment, but lairholders are entitled to prevent the imposition of extortionate or unreasonable charges. (4) The cemetery must be maintained in proper and suitable condition, and lairholders are entitled to stop any practice of conducting interments in an offensive or insanitary manner. Every lairholder has a title to sue for vindication

<sup>1</sup> *Swan v. Haliburton*, 1830, 8 S. 637.

<sup>2</sup> 18 & 19 Vict. c. 68.

<sup>3</sup> *Bain v. Lady Seafeld*, 1884, 12 R. 62.

<sup>4</sup> Craig, i. xv. 11 ; Ersk. ii. i. 8 ; Bankt. i. iii. 12, and ii. viii. 194.

<sup>5</sup> Duncan, Par. Ecc. Law, chap. vi. s. xxi. paras. 92 and 93, Johnston's ed., 218.

<sup>6</sup> *Kirk Session of Duddingston v. Halyburton*, 1832, 10 S. 196.

<sup>7</sup> *Swan v. Haliburton*, *ut supra*.

<sup>8</sup> *Edinburgh Southern Cemetery Co. v. Surveyor of Taxes*, 1889, 17 R. 154.

<sup>9</sup> *Cunningham v. Edmiston*, 1871, 9 M. 869, per L. Gifford, Ordinary, 875 *et seq.*

<sup>10</sup> *Paterson v. Beattie*, 1845, 7 D. 561.

of his own rights, but a portion of them cannot sue in the name of the whole. They are not entitled to require the proprietors of the cemetery either to denude, as soon as the lairs are all disposed of, or to transfer the management to a committee of lairholders.<sup>1</sup> Lairholders were refused interdict against the erection of a cenotaph to the memory of the Political Martyrs of 1793–4, it being a monument essentially of a sepulchral and solemn character, and there being nothing unseemly or contrary to public decency in the erection.<sup>2</sup> There is no law to prevent the erection of a monument to men as to whose merits there is diversity of opinion. Where a grave had been purchased with the funds of the deceased, and his mother had erected a tombstone, it was held that the deceased's executor was not entitled to remove this tombstone.<sup>3</sup> Where a cemetery company received from the purchasers of lairs lump sums for keeping the lairs in order in lieu of annual payments, it was held that these lump sums were assessable for income tax under Schedule A, No. 3, Rule III. of the Income Tax Act, 1842.<sup>4</sup>

### SECTION 3.—PUBLIC BURYING-PLACES.

**1268.** These are burying-grounds in which all inhabitants of a particular district have the right of sepulture. They are mainly of two classes—kirkyards, and burial-grounds provided under the Burial-Grounds Act, 1855. There appears, however, to be a third class, where long use has conferred rights of burial on the public of a district. Restalrig burial-ground (a pre-Reformation one), though not the parish churchyard, was one in which the inhabitants of the district had the right of burial.<sup>5</sup> It was managed by a Friendly Society, surplus funds being devoted to pious uses in the district. In the *Beauly* case it appeared that by immemorial usage the inhabitants of the district had acquired the right of sepulture in Beauly Priory.<sup>6</sup>

#### SUBSECTION (1).—Kirkyards.

**1269.** From early Christian times burial in or near the church was desired, from motives of religion.<sup>7</sup> The General Assembly passed an Act forbidding burial within churches,<sup>8</sup> but there is no statutory prohibition. At one time the patron seems to have been entitled to a burial-place in the church. No right of burial in a church would now be recognised unless in respect of immemorial usage.<sup>9</sup> A family burial-place in a church is transmissible *specific* by disposition;<sup>10</sup> and the

<sup>1</sup> Duncan, Par. Ecc. Law, chap. vi. s. xx. paras. 89–91, Johnston's ed., 216; *Cunningham v. Edmiston*, 1871, 9 M. 869.

<sup>2</sup> *Paterson v. Beattie*, 1845, 7 D. 561.

<sup>3</sup> *Wright v. Wright*, 1881, 9 R. 15.

<sup>4</sup> *Paisley Cemetery Company, Limited v. Inland Revenue*, 1898, 25 R. 1080.

<sup>5</sup> *Kirk Session of South Leith v. Scott*, 1832, 11 S. 75.

<sup>6</sup> *Lord Lovat v. Fraser*, 1845, 8 D. 316.

<sup>7</sup> Duncan, Par. Ecc. Law, chap. vi. s. ii. para. 4, Johnston's ed., 171.

<sup>8</sup> *Ibid.*, s. xvii. paras. 83–85, Johnston's ed., 813.

<sup>9</sup> *Ersk. i. v. 13.*

<sup>10</sup> *Monteith v. Hope*, 1695, 4 Bro. Supp. 261.



opinion is expressed by Erskine <sup>1</sup> that it would be carried by a grant of the lands, in virtue of the clause *cum pertinentiis*. This does not hold of a family burial-place in a kirkyard.<sup>2</sup>

1270. At common law the duty of providing and maintaining kirkyards lies on the heritors. Prior to the Reformation they were provided by the clergy, who recouped themselves out of the burial fees. After the Reformation the duty of providing kirkyards appears to have been regarded as one *ejusdem generis* with that of providing church, manse, and glebe; and accordingly, although the obligation was not imposed by statute, it was accepted by the heritors, and has been repeatedly recognised by the Court as binding.<sup>3</sup> Prior to the passing of the Church of Scotland (Property and Endowments) Act, 1925,<sup>4</sup> the duties incumbent upon the heritors and the procedure adopted to carry them out were as follows. The procedure was the same as in providing for the erection and maintenance of churches and manses and the designation of glebes. When the necessity arose, it was for the heritors to consider the matter, and to take steps to provide a kirkyard. It was in the first instance furnished by the heritor who had ground suitable for the purpose, and he was indemnified by the whole body of heritors (himself included), each bearing a share in proportion to the value of his property.<sup>5</sup> When ground had been thus provided, the heritors might apply to the Presbytery to designate it as the kirkyard, or as an addition thereto.<sup>6</sup> If the heritors failed to do what was necessary, the Presbytery might interpose to do so, on the representation of anyone having an interest.<sup>7</sup> When the Presbytery, after the usual procedure, had selected suitable ground, it has been suggested that they should have vindicated the ground from proprietor and tenant by action of declarator, in which all the heritors, the tenant of the ground, and probably the kirk session, ought to have been called as parties.<sup>8</sup> Within twenty days of the Presbytery's judgment, an appeal might be taken to the sheriff, whose judgment, in turn, might be appealed within twenty days to the Lord Ordinary in Teind Causes.<sup>9</sup> But the Court of Session has no further jurisdiction in such matters, except that implied in its function of redressing any violation by an inferior Court of the ordinary rules of procedure common to all Courts.<sup>10</sup> The Court of Session, sitting as Commissioners of Teinds, has no power to fix a new kirkyard for a parish.<sup>11</sup>

<sup>1</sup> Ersk. ii. vi. 11.

<sup>2</sup> *Steel v. Kirk Session of St. Cuthbert's Parish*, 1891, 18 R. 911.

<sup>3</sup> Duncan, Par. Ecc. Law, chap. vi. s. iii., Johnston's ed., 172; *Magistrates of Greenock v. Stewart*, 1777, Mor. App. Kirkyard, 1; 5 Bro. Supp. 414; Hailes, 758; revd. on point of pleading only, 1779, 2 Pat. 486; *Kirk Session of South Leith v. Scott*, 1832, 11 S. 75.

<sup>4</sup> 15 & 16 Geo. V. c. 33.

<sup>5</sup> *Magistrates of Greenock v. Stewart*, *ut supra*.

<sup>6</sup> Duncan, *ut supra*, s. vi., Johnston's ed., 180.

<sup>7</sup> *Walker v. Presbytery of Arbroath*, 1876, 3 R. 498; *affd.* 1876, 4 R. (H.L.) 1.

<sup>8</sup> *Magistrates of Greenock v. Stewart*, *ut supra*, 2 Pat. 486.

<sup>9</sup> Ecclesiastical Buildings Act, 31 & 32 Vict. c. 96.

<sup>10</sup> *Walker v. Presbytery of Arbroath*, 1876, 3 R. 498; *affd.* 1876, 4 R. (H.L.) 1.

<sup>11</sup> *Maitland v. May*, 1766, Hailes, 109.



1271. As the kirkyard must be large enough to receive the bodies of all dead parishioners whose relatives wish them to be buried there,<sup>1</sup> the duty of the heritors extended to enlarging it when necessary. There is statutory obligation on them to build and maintain the kirkyard dykes with stone and mortar to the height of two ells.<sup>2</sup> The heritors were not relieved of the obligation to enlarge, by transferring the kirkyard to the Parish Council.<sup>3</sup> There may be constructive appropriation of ground as part of a kirkyard by acquiescence in its use for burial.<sup>4</sup>

1272. The kirkyard belonged to the heritors, subject to the single burden of interring the dead.<sup>5</sup> They were proprietors in trust, and their powers were conditioned by the requirements of the trust. They were owners of the trees in the kirkyard, and of the strata underneath; and might, it is thought, utilise these, so long as the purposes of the trust were not interfered with.<sup>6</sup> But it appears that any profits arising from such dealings must be applied to parochial uses, in the same way as profits from interment fees, etc. The beneficiaries were the inhabitants of the parish, including heritors who had a residence in it, and their right was that of burial in the kirkyard on their decease.<sup>7</sup> None others could claim the right; but the bodies of strangers might be interred with the heritors' consent.<sup>8</sup>

1273. The heritors had the regulation and management of the kirkyard.<sup>9</sup> They might devolve these duties on others, and frequently did so, the kirk session in many cases having the actual management. Where they permitted anyone—minister, heritors' clerk, beadle—to allocate lairs on their behalf, they were bound by the actings of these individuals.<sup>10</sup> They could legally divest themselves of these powers only by transferring the kirkyard to the parish council.<sup>11</sup>

1274. In the allocation of the area, the heritors were entitled to have family burying-places reserved for themselves before lairs were given to other parishioners.<sup>12</sup> Thereafter the lairs were allocated for interment as they were required.<sup>13</sup> When ground had been allocated, it must not be arbitrarily interfered with. Only "some overruling necessity or

<sup>1</sup> *Kirk Session of Duddingston v. Halyburton*, 1832, 10 S. 196.

<sup>2</sup> 1597, c. 232.

<sup>3</sup> 57 & 58 Vict. c. 58, s. 30.

<sup>4</sup> *Philorth v. Heritors of Rathan*, 1666, Mor. 5620; *Earl of Mansfield v. Wright*, 1824, 2 Sh. App. 104.

<sup>5</sup> L. Hailes in *Magistrates of Greenock v. Stewart*, 1777, Hailes, 758; cp. *Cunningham v. Cunningham*, 1778, 5 Bro. Supp. 415; *Hill v. Wood*, 1863, 1 M. 360; *Russell v. Marquess of Bute*, 1882, 10 R. 302; *Bain v. Lady Seafeld*, 1884, 12 R. 62; *Steel v. Kirk Session of St. Cuthbert's Parish*, 1891, 18 R. 911.

<sup>6</sup> Duncan, *Par. Ecc. Law*, chap. vi. s. xiv. paras. 70–73, Johnston's ed., 206; Dunlop, *Par. Law*, 84; Rankine, *Land-Ownership*, 4th ed., 190.

<sup>7</sup> *Ibid.*, s. vii. paras. 24–28, p. 182.

<sup>8</sup> *Cunningham v. Cunningham*, *ut supra*.

<sup>9</sup> *Ure v. Ramsay*, 1828, 6 S. 916; *Hill v. Wood*, *ut supra*.

<sup>10</sup> *Wilson v. Brown*, 1859, 21 D. 1060.

<sup>11</sup> 57 & 58 Vict. c. 58, s. 30; cp. *Russell v. Marquess of Bute*, *ut supra*, per Lord Kinneir, Ordinary.

<sup>12</sup> Duncan, *ut supra*, s. vii., Johnston's ed., 182; cp. argument in *Kirk Session of Duddingston v. Halyburton*, 1832, 10 S. 196.

<sup>13</sup> Rankine, *Land-Ownership*, 4th ed., 191.

strong expediency”<sup>1</sup> will justify encroachment on a grave in which the right of sepulture has been acquired.<sup>2</sup> It was thus only in exceptional cases that the heritors were entitled to allocate of new a lair which had previously been allocated. As the purpose of interment is the disintegration of the body, the heritors would in theory have been entitled to resume the grave for allocation when the process of disintegration was complete. But where a grave was used as a family burying-place, or where near relatives of the deceased survived, considerations of policy and good feeling made reallocation impossible. If, however, the latest burial in the grave was very remote, old graves might—especially if there was want of space in the kirkyard—be used for new tenants.<sup>3</sup> In a case of high expediency, heritors were allowed to encroach on the kirkyard for the extension of the church.<sup>4</sup> Allocation gave the allottee and his representatives a possessory right, which they can vindicate against threatened encroachment;<sup>5</sup> and it is no answer to their objection, to offer a right of sepulture elsewhere in the churchyard.<sup>6</sup> The right of protecting a grave against encroachments extends to representatives of the deceased who are not resident in the parish.<sup>7</sup>

1275. The general principle ruling the heritors’ management was, that it must be in all respects consistent with the purposes of the trust. Even the heritors could not combine to use a kirkyard for a purpose foreign to its proper uses. This would have been a breach of trust which any parishioner could have prevented.<sup>8</sup> The statutes against the holding of fairs and markets in kirkyards<sup>9</sup> simply attach a severe penalty to what is prohibited by the common law. Although in virtue of custom the minister has been held entitled to the grass of the kirkyard,<sup>10</sup> yet he is not entitled to pasture his bestial there, his right being simply to cut the grass and remove it for use.<sup>11</sup> It cannot be computed as part of the minister’s grass.<sup>12</sup> The management must not be inconsistent with respect for the feelings of the relatives of the dead;<sup>13</sup> and accordingly, while the heritors were entitled to improve the kirkyard by lowering levels and otherwise, they were bound to treat reverentially any remains thus disturbed.<sup>14</sup>

<sup>1</sup> *Hill v. Wood*, 1863, 1 M. 360.

<sup>2</sup> *Wilson v. Brown*, 1859, 21 D. 1060.

<sup>3</sup> Duncan, Par. Ecc. Law, chap. vi. s. xii. para. 61, Johnston’s ed., p. 200; *Ure v. Ramsay*, 1828, 6 S. 916.

<sup>4</sup> *Steel v. Kirk Session of St. Cuthbert’s Parish*, 1891, 18 R. 911; contrast *Hill v. Wood*, *ut supra*.

<sup>5</sup> *M’Bean v. Young*, 1859, 21 D. 314; *Wilson v. Brown*, *ut supra*.

<sup>6</sup> *Hill v. Wood*, *ut supra*.

<sup>7</sup> *Turner v. Committee for the West Church, Greenock*, 1869, 7 M. 538.

<sup>8</sup> *Wright v. Elphinstone*, 1881, 8 R. 1025.

<sup>9</sup> 1503, c. 83, and 1579, c. 70.

<sup>10</sup> *Hay v. Williamson*, 1778, Mor. 5148; *Spence v. Hall*, 1st Dec. 1808, F.C.

<sup>11</sup> *Beaton v. Dallas*, 1734, Elch. Glebe, No. 1; *Hay v. Williamson*, *ut supra*; Duncan, *ut supra*, 189.

<sup>12</sup> *Beaton v. Dallas*, *ut supra*; *Bass v. Young*, 1609, Mor. 8019.

<sup>13</sup> *Wilson v. Brown*, *ut supra*.

<sup>14</sup> *Robertson v. Salmon*, 1868, 5 S.L.R. 405; cp. *Steel v. Kirk Session of St. Cuthbert’s Parish*, *ut supra*.

**1276.** The heritors were entitled to exercise control as to all erections in the kirkyard. This control extended not only to erections of an unusual character, such as a wooden building for watching against resurrectionists,<sup>1</sup> but also to tombstones and other monumental erections.<sup>2</sup> The heritors had the right to grant or refuse permission to place tombstones over the graves, and to determine the manner in which they should be placed, as upright or flat; and it can scarcely be doubted that, if necessary, the heritors might have caused such gravestones to be removed.<sup>3</sup> So entirely were all erections within the heritors' control, that, having permitted the erection of a mausoleum, they could prevent it from being used as a chapel,<sup>4</sup> though indeed this would be open to the objection of any parishioner, as a diversion of the ground from its proper uses.

**1277.** In the course of management the heritors might, in certain circumstances, alienate or excamb part of the kirkyard, but it required a very strong case of necessity or high expediency. There might be alienation or excambion of a portion inconveniently situated in which there had been no burial for a long time, or of a portion which had never been used for burial.<sup>5</sup> It was held *ultra vires* to excamb a part used recently for burial in return for an addition to the kirkyard.<sup>6</sup> Excambion by minister and presbytery was invalid, the sole title being in the heritors.<sup>7</sup>

**1278.** As proprietors, the heritors took all steps necessary for the protection of the kirkyard, but any one heritor might interfere to prevent encroachment, *i.e.* to prevent any inversion of the possession.<sup>8</sup> Their powers included power to compromise.<sup>9</sup> They defrayed any expenses from the heritors' assessment. Parishioners cannot obtain any right of property in a grave in the kirkyard, but the interest acquired to protect the grave against interference is a right of a very strong character. Every parishioner has a title to check any breach of the trust subject to which the kirkyard is held. As regards rights of burial, Dissenters are under no disabilities.

**1279.** By the Local Government (Scotland) Act, 1894,<sup>10</sup> "the heritors of any parish may transfer the property of any churchyard which they hold to the parish council, and the parish council, if they accept such transfer, shall thereafter hold such churchyard for the same purposes" and with the same duties, powers, and liabilities as previously lay on the heritors. But the power, duty, and expense of extending the churchyard remained on the heritors, as did also liability for existing debt. See PARISH COUNCIL.

<sup>1</sup> *Ure v. Ramsay*, 1828, 6 S. 916.

<sup>2</sup> *M'Bean v. Young*, 1859, 21 D. 314.

<sup>3</sup> Dunlop, Par. Law, p. 76; Duncan, Par. Ecc. Law, chap. vi., Johnston's ed., 202; Rankine, Land-Ownership, 4th ed., 192.

<sup>4</sup> *Wright v. Elphinstone*, 1881, 8 R. 1025.

<sup>5</sup> Duncan, *ut supra*.

<sup>6</sup> *Russell v. Marquess of Bute*, 1882, 10 R. 302.

<sup>7</sup> *Bain v. Lady Seafield*, 1887, 14 R. 939.

<sup>8</sup> *Ure v. Ramsay*, *ut supra*.

<sup>9</sup> *Fraser v. Turner*, 1893, 21 R. 278.

<sup>10</sup> 57 & 58 Vict. c. 58, s. 30, subsec. (6).



SUBSECTION (2).—*Burial-Grounds.*

**1280.** Under the Burial-Grounds (Scotland) Act, 1855, and amending Acts,<sup>1</sup> certain local authorities are empowered, and in some circumstances required, to provide burial-grounds.<sup>2</sup> The statute did not in terms affect the powers and duties of heritors with respect to kirkyards, but in practice it materially lightened the burden on them. It is to be noticed that whereas all relating to kirkyards falls under ecclesiastical arrangements, the procedure under the Act of 1855 is purely civil. This distinction is of importance as regards all changes in the boundaries of parishes effected under the Local Government (Scotland) Acts of 1889 and 1894.<sup>3</sup>

**1281.** The administration of the Act is intrusted to local authorities as follows :—In burghs having the parliamentary franchise (within the boundaries as fixed for valuation purposes), the local authority is the town council (*a*) if the parish and the burgh are co-extensive ; (*b*) if the burgh contains parts of two or more parishes ; (*c*) if the burgh contains only part of one parish and the sheriff has determined that the whole parish shall be treated as burghal. In all other cases the local authority is the parish council.<sup>4</sup>

**1282.** The statute may be put in operation in two ways : (*a*) An existing burial-ground may be closed. (*b*) On requisition by ten ratepayers or by two councillors, the council must, at a special meeting, consider the advisability of providing a new burial-ground, and by a majority of those present may resolve to do so. The effect alike of a closing order and of such a resolution is that the council must forthwith proceed to provide a suitable and convenient burial-ground. If, from any cause, it is not provided within six months of the closing order or of the requisition, the council, or ten or more ratepayers, or two councillors, may apply to the sheriff to have the necessary ground designated.<sup>5</sup> After inquiry and intimation, the sheriff designates a burial-ground, his decision being appealable within fourteen days to any Lord Ordinary of the Court of Session. The burial-ground must not be within 100 yards of any dwelling-house, unless the owner consents in writing. It need not be within the parish. Councils of different districts may combine in providing a burial-ground, the councils acting for this purpose as one joint council. An existing cemetery may be purchased, or the council may contract for the right of interment in an existing cemetery. Provision is made for the application of the Lands Clauses Act when necessary. A burial-ground so provided becomes the burial-ground of the parish or parishes ; and where a new burial-ground is

<sup>1</sup> 18 & 19 Vict. c. 68 ; 20 & 21 Vict. c. 42 ; 49 & 50 Vict. c. 21.

<sup>2</sup> White, *Local Government in Scotland*, pp. 311–323 ; Duncan, *Par. Ecc. Law*, chap. vi. s. xxiii., Johnston's ed., 221.

<sup>3</sup> 52 & 53 Vict. c. 50, ss. 49, 51, and 96 ; 57 & 58 Vict. c. 58, s. 46 ; Shennan, *Boundaries of Counties, etc.*, Introduction, p. xxix.

<sup>4</sup> 18 & 19 Vict. c. 68, ss. 2 and 3 ; 19 & 20 Vict. c. 103, s. 69 ; 29 & 30 Vict. c. 50.

<sup>5</sup> *Fulton v. Dunlop*, 1862, 24 D. 1027.



provided in the place of one closed under the Act, the new burial-ground takes over all the liabilities of the old.<sup>1</sup>

**1283.** An anomalous case may arise where (as has been done) the local authority acting under the Act has made an addition to a kirkyard. Any difficulty of administration could be got over by the heritors transferring the kirkyard to the parish council.<sup>2</sup>

**1284.** The management of a burial-ground is vested in the town council or parish council, and is exercised subject to such general regulations relating to burial-grounds as may be made by the Secretary for Scotland. The statute permits the local authority to sell exclusive rights of burial in such parts of the burial-ground as the sheriff may sanction,<sup>3</sup> and also the right of raising chapels and monumental erections. They may provide for the conveyance of bodies to the burial-ground, and provide a place for their reception prior to interment. They may lay out the burial-ground appropriately, and for its protection certain provisions of the Cemeteries Clauses Act, 1847 (an English Act), are incorporated. They may charge such interment fees as the sheriff approves.<sup>4</sup> They may appoint the necessary officials, and dismiss them at pleasure.<sup>5</sup> They must keep separate minute-books and account-books, to be open to the inspection of ratepayers; and also a register of burials, in which all burials must be entered so as to identify where the several bodies are buried.<sup>6</sup> Any deficiency in the funds is raised by an assessment, levied in the same manner as the poor-rate, and there is power to borrow for capital expenditure.<sup>7</sup>

#### SECTION 4.—THE CLOSING OF BURYING-PLACES.

**1285.** "Any churchyard, cemetery, or place of sepulture, so situated or so crowded with bodies, or otherwise so conducted as to be offensive or injurious to health," is a nuisance within the meaning of the Public Health (Scotland) Act, 1867;<sup>8</sup> and the powers conferred by that Act for the removal of nuisances have been exercised to secure the closing of such burial-places. The same end may be secured, and the opening of new burial-grounds in unsuitable localities may be restrained, by the method prescribed in the Burial-Grounds Act.<sup>9</sup> The initiative may be taken by two members of the parish council, or ten ratepayers, or two householders residing within a hundred yards of the burial-ground or proposed burial-ground, or by the Local Government Board for Scotland.<sup>10</sup> The procedure is by petition to the sheriff, who, after inquiry, pronounces an interlocutor and transmits it to the Secretary for Scotland. On the latter's representation, His Majesty in Council may restrain the opening

<sup>1</sup> 18 & 19 Vict. c. 68, ss. 15 and 16.

<sup>2</sup> 57 & 58 Vict. c. 58, s. 30.

<sup>3</sup> 49 & 50 Vict. c. 21, amending s. 18 of the principal Act.

<sup>4</sup> 18 & 19 Vict. c. 68, ss. 17-25.

<sup>5</sup> *Ibid.*, s. 30.

<sup>6</sup> *Ibid.*, ss. 29 and 31.

<sup>7</sup> *Ibid.*, ss. 26 and 27.

<sup>8</sup> 30 & 31 Vict. c. 101, s. 16.

<sup>9</sup> 18 & 19 Vict. c. 68, ss. 4-8.

<sup>10</sup> 30 & 31 Vict. c. 101, s. 96; White, Local Government in Scotland, p. 318; Duncan, Par. Ecc. Law, chap. vi. s. xxiv., Johnston's ed., 222.

of a new burial-ground, and order the discontinuance of burials in specified places.

SECTION 5.—CHURCH OF SCOTLAND (PROPERTY AND  
ENDOWMENTS) ACT, 1925.

SUBSECTION (1).—*Churchyards of Burgh and Parliamentary Churches.*

**1286.** The Church of Scotland (Property and Endowments) Act, 1925,<sup>1</sup> provides for an inquiry by the Scottish Ecclesiastical Commissioners into the circumstances relating to the existing rights of property in and the expenditure upon *inter alia* any churchyard connected with the churches referred to in the Act as burgh churches, and for the formation of schemes for their future ownership, maintenance and administration (s. 22 (1)). Such schemes provide for the transfer to the Church of Scotland General Trustees of the rights of property in these churchyards, which were vested in the magistrates or the town council of the burghs within which the burgh churches were situated (s. 22 (2) (a)), with the exception of certain specified churchyards (s. 22 (4)). Similar provisions are made for the transfer to the General Trustees of the churchyards connected with the churches designed in the Act as parliamentary churches (s. 23).

SUBSECTION (2).—*Churchyards of Parish Churches.*

**1287.** The transfer to, and the vesting in, the parish councils of all rights of property in and duties of maintenance and extension of the churchyards of parish churches, and the extinction of all such rights and duties, which prior to the passing of the Act belonged to and were incumbent upon the heritors or ministers is provided for by Part III. of the Act (s. 26). Burying-grounds are exempt from certain assessments which may fall to be made in consequence of s. 28 of the Act (s. 28 (6) (a)). Detailed provisions for the transfer of parish churchyards from the heritors to parish councils are made as follows (s. 32):—

(1) The property in the churchyards is transferred from the heritors to the parish council at and from the passing of the Act, without any further conveyance, to the same effect as if it had been transferred in pursuance of subsec. (6) of s. 30 of the Local Government (Scotland) Act, 1894 (s. 32 (1)).

(2) Due respect is to be paid to the dead and to the wishes of their relatives before any ground is reallocated (s. 32 (1)).

(3) The power or duty of enlarging or extending the churchyard and of assessing therefor is also transferred, and parish councils are to have the powers relating to the acquisition of land for burial-grounds contained in the Burial-Grounds (Scotland) Act, 1855,<sup>2</sup> and charges in connection with land so acquired are a charge on the poor rate or the assessment under the said Act of 1855 (s. 32 (1)).

<sup>1</sup> 15 & 16 Geo. V. c. 33.

<sup>2</sup> 18 & 19 Vict. c. 68.

(4) Where the churchyard surrounds a church or other ecclesiastical building, rights of access are preserved, funerals are prohibited during the usual time of the ordinary services of the church, roads and paths through the churchyard are to be kept in good order and repair, and part of the churchyard may be used for the enlargement or repair of the church subject to the same conditions and restrictions as if the Act had not been passed, and if used for enlargement of the church the part so used shall vest in the heritors or the general trustees or other body holding the church (s. 32 (1)).

1288. The provisions relating to the sale of the right of burial as contained in s. 18 of the Burial-Grounds (Scotland) Act, 1855, are to apply to any churchyard so transferred and to any enlargement or extension thereof (s. 32 (2)). Where the local authority exercising the powers and carrying out the duties under the Burial-Grounds (Scotland) Act, 1855, is not a parish council, the provisions of s. 32 of the Act apply to that local authority, and if there be more than one local authority concerned, then to the local authority in whose district the churchyard is situated (s. 32 (3)). Similar provisions are made for transfer to parish councils of churchyards which are held by the kirk session of a parish (s. 32 (4)). Provision is made to enable the kirk session of a parish to have transferred to them the custody, maintenance, and control of a churchyard which has been transferred to the parish council or other local authority under the Act, in the event of the churchyard having been closed (s. 32 (5)). Provision is also made for the preservation and maintenance of monuments or gravestones by those interested, with the approval of the parish council concerned (s. 33).

## SECTION 6.—BURIAL.

### SUBSECTION (1).—*Rights of Relatives in Dead Body.*

1289. According to Alison,<sup>1</sup> “our practice recognises no property in the bodies of deceased relations after they have been committed to the grave.” Whether before burial a husband, wife, or next-of-kin has any right of property in the body of a deceased wife, husband, or relation, is open to doubt, and they may probably be more accurately looked upon as merely the lawful custodiers of the body. The right of the custodian to dispose of the dead body, besides being regulated by the ordinary laws of decency and sanitation, is limited by statute; while even the wish of the deceased, expressed before death, as to the disposal of his own body may be interfered with by any near relative after his death.<sup>2</sup> Our law would never approve of the arresting of a corpse for debt.<sup>3</sup>

<sup>1</sup> Alison's Criminal Law, p. 461.

<sup>2</sup> Anatomy Acts, *infra*, para. 1291; *Pollok v. Workman*, 1900, 2 F. 354, as to unauthorised *post-mortem* dissection; also *Conway v. Dalziel*, 1901, 3 F. 918.

<sup>3</sup> Brown's Supplement, 1677, vol. iii. p. 136.



SUBSECTION (2).—*Statutory Provisions as to Burial.*

**1290.** (1) Under the Capital Punishment Act, 1868,<sup>1</sup> the body of every offender executed is to be buried within the walls of the prison in which he has been executed, or, if there is no space therein, in such other fit place as the Secretary for Scotland may appoint.

(2) It is the duty of the local authority under the Public Health Acts “to bury any dead body found within the district and which is unclaimed, or which no sufficient person undertakes to bury.”<sup>2</sup>

(3) When a dead body is retained in a house in such a state as to be injurious to the health of the inmates, a magistrate or justice may, on a certificate signed by a legally qualified medical practitioner, direct it to be buried within a limited time.<sup>2</sup>

(4) When the provisions of the Public Health Acts for the prevention of diseases are put in force, the Local Government Board for Scotland may issue regulations requiring speedy interment of the dead.<sup>3</sup>

## SECTION 7.—ANATOMY ACTS.

**1291.** The Anatomy Acts regulate the conditions under which anatomy may be practised for the purposes of science, but do not interfere with *post-mortem* examinations directed by the legal authorities. The principal Act is the Anatomy Act, 1832,<sup>4</sup> which is amended in one detail by the Act of 1871.<sup>5</sup> Licences to practise anatomy will be granted by the Secretary of State to qualified practitioners, and to teachers and students of anatomy, on presentation of a petition, accompanied by a certificate signed by two justices of the peace, certifying their belief that the applicant intends to carry on the practice of anatomy (s. 1). A week’s notice must be given to the Secretary of State of any place in which it is intended to practise (s. 12). Inspectors of anatomy are to be appointed by the Secretary of State (s. 2), and he may appoint their districts and regulate their method of supervision (s. 3); but they must report quarterly on all bodies subjected to anatomy in their district (s. 4), and must inspect all places where anatomy is practised (s. 5).

**1292.** Anyone who has the lawful custody of a body, except for the purposes of interment, may permit it to undergo anatomical examination (s. 7), unless to his knowledge the deceased in his lifetime expressed a wish to the contrary (s. 7). The objection of a near relative is always sufficient to stay the examination (s. 7), even if the deceased had expressed a wish that his body should be examined (s. 8).

**1293.** No dead body may be removed until forty-eight hours after death, and twenty-four hours’ notice of the intention to remove it must be given to the inspector of the district (s. 9). The body must be placed

<sup>1</sup> 31 & 32 Vict. c. 24, ss. 6 and 13.

<sup>3</sup> *Ibid.*, s. 35.      <sup>4</sup> 2 & 3 Will. IV. c. 75.

<sup>2</sup> 30 & 31 Vict. c. 101, s. 43.

<sup>5</sup> 34 & 35 Vict. c. 16.



in a decent coffin prior to its removal (s. 13), and a certificate of death obtained from a doctor, which must be handed with the body to the person receiving it for anatomical purposes (s. 9).<sup>1</sup> A licensed practitioner (s. 1) who has complied with the above regulations is entitled to be in possession of a dead body (s. 10), but he must transmit the death certificate to the district inspector within twenty-four hours of his receiving the body, with full particulars as to how and from whom he received it (s. 11), and he must send the inspector a certificate of the interment in consecrated ground (s. 13) within such period as the Secretary of State shall from time to time order.<sup>2</sup>

**1294.** No restriction is placed on *post-mortem* examinations directed by legal authorities (s. 15), but dissection of murderers is forbidden, and their bodies must be buried within the prison (s. 16).

#### SECTION 8.—CREMATION.

**1295.** This method of disposing of dead bodies has always been much used in the East ; but in Europe it seems to be opposed to the instincts of most people, and certainly has never been generally adopted. There is, however, no doubt that, apart from sentimental considerations, it is, from a purely sanitary point of view, preferable to interment. Sanitary reformers have for some time advocated its adoption in this country, but the general opinion was that it was illegal, and, consequently, cremations seldom or never took place. A case, however, came before Mr. Justice Stephen, who decided that, if conducted in such a way as not to offend public feeling or prevent proper investigation being made as to the cause of death, cremation is not illegal.<sup>3</sup> After that decision, crematoria were started, and those who desired to set an example of disposing of the dead in such a manner as to prevent the danger of their poisoning the living, could cremate them.

**1296.** The legislature has now given its sanction to this mode of disposing of the remains of the dead, and has prescribed regulations for carrying it out. The Cremation Act, 1902,<sup>4</sup> does not apply to Ireland. It applies to Scotland ; but its provisions, conceived in terms applicable specially to England, are in some cases meaningless in relation to Scotland. The powers of a burial authority to provide and maintain burial-grounds or cemeteries, or anything essential, ancillary, or incidental thereto, are extended to and include the provision and maintenance of crematoria (s. 4). In Scotland the burial authority is the parish council or town council of any parish or burgh, as the case may be, vested with the powers and duties conferred by the Burial-Grounds Act, 1855,<sup>5</sup> or any Act amending the same (s. 3). No

<sup>1</sup> *H.M. Advocate v. Daniel*, 1891, 3 White, 103.

<sup>2</sup> 34 & 35 Vict. c. 16.

<sup>3</sup> *R. v. Price*, 1884, 12 Q.B.D. 247.

<sup>4</sup> 2 Edw. VII. c. 8 ; White, Local Government in Scotland, pp. 323-325.

<sup>5</sup> 18 & 19 Vict. c. 58.

human remains are to be burned in any such crematorium until the plans and site have been approved by the Local Government Board for Scotland, and until the crematorium has been certified by the burial authority to the Secretary for Scotland to be complete, built in accordance with such plans, and properly equipped for the disposal of human remains by burning (s. 4). No crematorium may be constructed nearer to any dwelling-house than two hundred yards, except with the consent in writing of the owner, lessee, and occupier ; nor within fifty yards of any public highway, nor in the consecrated part (*sic*) of the burial-ground of any burial authority (s. 5). A burial authority may accept a donation of land or money for the acquisition, construction, or maintenance of a crematorium (s. 6). Power is conferred on the Secretary for Scotland to make regulations dealing with crematoria, and as to the registration of the burnings therein, and these are to be laid before both Houses of Parliament (s. 7).

**1297.** The Cremation Regulations, 1903, for England came into force on 11th May 1903. They are contained in an Order of the Home Secretary.<sup>1</sup> No regulations have yet been made for Scotland,<sup>2</sup> but Scottish Cremation Authorities act upon the English Regulations.<sup>3</sup> The statutory provisions relating to the destruction and falsification of registers of burials, and the admissibility of extracts therefrom as evidence in Courts or otherwise, are to apply to the register of burnings ; and the Stamp Act, 1891, is to apply to the register as if it were a register of burials (s. 7).

**1298.** The burial authority may charge fees according to a table to be approved by the Local Government Board for Scotland (s. 9). These fees, and any other expenses properly incurred in or in connection with the cremation of a deceased person, are to be deemed part of the funeral expenses of the deceased (*ibid.*). Section 8 prescribes penalties for breach of regulations, making false declarations, etc. Every person who, with intent to conceal the commission or impede the prosecution of any offence, procures or attempts to procure the cremation of any body, or with such intent makes any declaration or gives any certificate under the Act, is liable on conviction or indictment to penal servitude for five years (s. 8 (3)). Sections 52 and 57 of the Cemeteries Clauses Act, 1847,<sup>4</sup> an English statute, are made applicable to the disposition or interment of the ashes of a cremated body.<sup>5</sup>

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<sup>1</sup> Stat. Rules and Orders, Rev. 1904, vol. iv.: Cremation (England), dated 31st March 1903.

<sup>2</sup> Index to Statutory Powers and Rules and Orders in force 30th June 1924.

<sup>3</sup> Glaister, Medical Jur. and Toxicology, 4th ed., p. 172.

<sup>4</sup> 10 & 11 Vict. c. 65.

<sup>5</sup> 2 Edw. VII. c. 8, s. 13.

## BURSARY.

*See* CHARITABLE TRUSTS; EDUCATION.

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## BUSINESS DAY.

*See* BILLS OF EXCHANGE; TIME, COMPUTATION OF.

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## BUTTER.

*See* FOOD AND DRUGS.

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## BUYING OF PLEAS.

*See* CRIME.

# BY-LAW.

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## SECTION 1.—DEFINITION.

1299. By-law<sup>1</sup> has been variously defined. “A by-law is a law made with due legal obligation, by some authority less than the Sovereign and Parliament, in respect of a matter specially or impliedly referred to that authority, and not provided for by the general law of the land.”<sup>2</sup> “A bye-law is a rule obligatory on a body of persons or over a particular district, not being at variance with the general laws of the realm, and being reasonable and adapted to the purposes of the Corporation; and any rule or ordinance of a permanent character which a Corporation is empowered to make, either by the common or statute law, is a bye-law.”<sup>3</sup> These definitions emphasise two features of a by-law—that it is made by an external authority, and that it has the force of law.<sup>4</sup> “By-law” is, however, sometimes used in the sense of a rule or regulation made by an unincorporated body, club, or association, binding only on the members of the body, or their servants. In this sense the by-law depends for its effectiveness upon contract or agreement.<sup>5</sup> Statute may intervene to control or override the contractual relation.<sup>6</sup>

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GENERAL AUTHORITIES.—Lumley on By-laws; Grant on Corporations; Brice on Ultra Vires; Muirhead, Bye-laws and Standing Orders for Burghs; Muirhead, Municipal Government; Ferguson, Railway Law.

<sup>1</sup> *Icel.*—*Bær*, village; *Lög*, law. Hence a town-law or village-law. Probably confused with *By* in sense of subsidiary, or subordinate, + law. Cf. By-way, By-name.

<sup>2</sup> Lumley on By-laws, p. 2. <sup>3</sup> Grant on Corporations, p. 76.

<sup>4</sup> *London Association of Shipowners and Brokers v. London and India Docks Joint Committee*, [1892] 3 Ch., 242 at 252; *Kruse v. Johnson*, [1898] 2 Q.B. 91, at 96; Dicey, Const. Law (8th ed.), 90–91.

<sup>5</sup> *Harington v. Sendall*, [1903] 1 Ch. 921; *Wise v. Perpetual Trustee Co.*, [1903] A.C. 139; *Thellusson v. Valentia*, [1907] 2 Ch. 1; *Hopkinson v. Marquis of Exeter*, 1867, L.R. 5 Eq. 63; *Lyttelton v. Blackburn*, 1876, 33 L.T. (N.S.), 641; *Dempster v. Masters and Scammon of Dundee*, 1831, 9 S. 313; *Sinclair v. Merc. Building Investment Soc.*, 1885, 12 R. 1243.

<sup>6</sup> *E.g.* Companies' Acts; Friendly Societies' Acts; Trade Union Acts, etc.



## SECTION 2.—BY-LAWS OF COMMON LAW CORPORATIONS.

**1300.** The by-laws of a corporation created by charter or custom may, and frequently do, operate to affect and bind members of the public, and so are proper by-laws.<sup>1</sup> Such by-laws must be within the terms of the corporation's constitution.<sup>2</sup> Consent of the whole body of corporators, it has been said, will validate a by-law otherwise open to objection on the ground of defect of power.<sup>3</sup> But this can only be in a question with the members of the corporation, not in a question with a stranger who is no party to the by-law.<sup>4</sup> The powers of trading corporations depending on charter or custom are of less importance since the abolition of the exclusive privilege of trading in burghs in Scotland.<sup>5</sup> Such corporations may make by-laws relative to the management and application of their funds and property, and relative to the qualification and admission of members in reference to their altered circumstances under the Act, and may apply to the Court for the sanction thereof.<sup>6</sup> By-laws may still be made by a corporation without such sanction which it would have been competent for such corporation to have made of its own authority or without such sanction.<sup>7</sup> A common-law corporation has an implied power to make by-laws incidental to and within the purposes of its constitution.<sup>8</sup> A corporation created by statute has on the contrary no power to make by-laws beyond what the statute gives it.<sup>9</sup> The majority of cases which arise with regard to the validity of by-laws made by a statutory body are merely illustrations of this rule.

## SECTION 3.—BY-LAWS UNDER STATUTE.

SUBSECTION (1).—*General.*

**1301.** Practically all bodies which are the creation of statute are given power to make regulations for their members, or by-laws affecting the public, or some section thereof. With regard to the latter power a distinction must be observed between corporations, or companies created for trading and profit-earning purposes, and corporations or

<sup>1</sup> Grant on Corporations, p. 77 and cases there cited; Lumley, p. 66 *et seq.*; *University of Glasgow v. Faculty of Surgeons*, 1837, 15 S. 736; 1 Rob. 397, esp. at 432; *Oliphant & Co. v. Mags. of Ayr*, 1775, Mor. 1971; *Dinning v. Procurators of Glasgow*, 1817, Hume, 166.

<sup>2</sup> *Galloway v. Ranken*, 1864, 2 M. 1199; *Sadler v. Webster*, 1893, 21 R. 107; *Gray v. Smith*, 1836, 14 S. 1062; *Tait v. Muir*, 1902, 5 F. 288; *R. v. Cutbush*, 1768, 4 Burr. 2204.

<sup>3</sup> *Browns v. Kilsyth Police Commissioners*, 1886, 13 R. 515, at 519.

<sup>4</sup> *Ashbury Railway Carriage, etc. Co. v. Riche*, 1875, L.R. 7 (H.L.) 653; cf. *Sinclair v. Merc. Building Investment Soc.*, 1885, 12 R. 1243.

<sup>5</sup> 9 & 10 Vict. c. 17.

<sup>6</sup> *Ibid.* s. 3. See *Incorporation of Tailors in Glasgow v. Trades House of Glasgow*, 1901, 4 F. 156; *Incorporation of Tailors of Edinburgh v. Muir's Tr.*, 1912 S.C. 603; *Incorporation of Cordiners of Edinburgh*, 1911 S.C. 1118; *Incorporation of Maltmen of Stirling*, 1912 S.C. 887.

<sup>7</sup> 9 & 10 Vict. c. 17, s. 3. See *Allan v. Incorporation of Cordiners of Edinburgh*, 1904, 42 S.L.R. 95.

<sup>8</sup> Lumley, p. 7; cf. Grant on Corporations, p. 76.

<sup>9</sup> *Q. v. Wood*, 1855, 5 E. & B. 49.

local authorities created for purposes of local government and of a public or representative character. Very general and wide powers of making by-laws are frequently conferred by the legislature upon local authorities. Much narrower powers, consonant with their more limited functions and sphere of operations, are confided to trading companies. By-laws made by companies will, moreover, be more jealously scrutinised by the Courts where their validity is called in question than will by-laws made by local authorities.<sup>1</sup> The latter ought to be "benevolently" interpreted.<sup>2</sup> The distinction taken in the English cases referred to has not been precisely stated in any case in Scotland. The principles upon which the Courts in the two countries proceed are, however, the same.<sup>3</sup> In some cases very liberal interpretations have been placed on the powers of local authorities in Scotland to make by-laws.<sup>4</sup>

#### SUBSECTION (2).—*Local Authorities.*

**1302.** By-laws of a local authority are generally subject to confirmation by a legal or departmental authority, such as the sheriff, or the Secretary for Scotland, and sometimes by both, and until this confirmation is obtained they are not effective. It is sometimes provided that they shall be laid before both Houses of Parliament after confirmation. Provision is also made in some cases for the order or by-law being annulled by His Majesty in Council on a resolution of either House. A provision that a by-law shall be laid before Parliament, without a further provision authorising its annulment, does not suspend the operation of the by-law if the provision is not carried out.<sup>5</sup>

**1303.** Confirmation by a superior authority does not prevent the Court holding the by-law invalid as *ultra vires* of the local authority,<sup>6</sup> unless there are words in the statute which exclude the Court's jurisdiction. But where it is provided that rules made under an Act shall be of the same effect as if they were contained in the Act,<sup>7</sup> or shall have the effect of an Act of Parliament,<sup>8</sup> their validity would not seem to

<sup>1</sup> *Slattery v. Naylor*, 1888, 13 App. Ca. 446, at 451 *seq.*; *Kruse v. Johnson*, [1898] 2 Q.B. 91, at pp. 99, 104; *White v. Morley*, [1899] 2 Q.B. 34, at 37; *Att.-Gen. v. Hodgson*, [1922] 2 Ch. 429, at 438.

<sup>2</sup> *Kruse v. Johnson* (*ubi cit.*).

<sup>3</sup> See *Da Prato v. Mags. of Partick*, 1907 S.C. (H.L.), 5, per Lord Robertson on p. 6.

<sup>4</sup> *Slowey v. Threshie*, 1901, 3 F. (J.) 73; *Davies v. Jeans*, 1904, 6 F. (J.) 37; cf. *Dunsmore v. Lindsay*, 1904, 6 F. (J.) 14; *Eastburn v. Wood*, 1892, 19 R. (J.), 100.

<sup>5</sup> *Hepburn v. Wilson*, 1901, 4 F. (J.) 18.

<sup>6</sup> *Scott v. Glasgow Corporation*, 1899, 1 F. (H.L.) 51 at 51, 55, 57; *Cadenhead v. Smart*, 1894, 22 R. (J.) 1. See also *Shepherd v. Howman*, 1918, J.C. 78; *Stewart v. Todrick*, 1908 S.C. (J.) 8; *Kerr v. Hood*, 1907 S.C. 895; *Duncan v. Crichton*, 1892, 19 R. 594. The doubt expressed by Lord M'Laren in *Crichton v. Forfar County Road Trs.*, 1886, 13 R. (J.) 99, must be regarded as negated by the above authorities.

<sup>7</sup> *Institute of Patent Agents v. Lockwood*, 1894, 21 R. (H.L.) 61; *Glasgow Insurance Comm. v. Scottish Insurance Commrs.*, 1915 S.C. 504.

<sup>8</sup> See *Hamilton v. Fyfe* 1907 S.C. (J.) 79; (defective procedure only) *Shepherd v. Howman*, 1918, J.C. 78. Cf. *Waterford Corporation v. Murphy*, [1920] 2 I.R. 165. (Printed copy of by-laws declared by the Act to be conclusive evidence of validity. Held not to preclude consideration of whether by-law *ultra vires*.)

be open to question.<sup>1</sup> The Courts have, however, considered such by-laws without reference to this special consideration.<sup>2</sup> And in one case they granted an interdict against proceeding with a Provisional Order which, when passed by the Secretary for Scotland, would have been confirmed by Act of Parliament.<sup>3</sup>

**1304.** While the legislature generally requires some further sanction, such as confirmation, to by-laws of a permanent nature, temporary by-laws or regulations to meet the occasional incidents and requirements of communal life do not generally require such confirmation. The two classes of by-laws may be authorised side by side in the same section of the statute, and regard must be had to the temporary or permanent nature of the regulation in deciding whether confirmation is necessary or not.<sup>4</sup> Statutory provision is frequently made for local enquiry and hearing of objections prior to confirmation.

#### SUBSECTION (3).—*Trading Companies.*

**1305.** The making of by-laws by a company, trading or operating under statutory powers, is regulated sometimes by the terms of the special Act, but more frequently by the clauses of Consolidation Acts incorporated therewith. In some undertakings provision is made for full hearing of objections by members of the public before the by-laws are approved or confirmed.<sup>5</sup> In other cases confirmation may be given by the departmental authority concerned without any public enquiry.<sup>6</sup> By-laws affecting officers and servants of such undertakers, and enforceable by penalties, do not require any confirmation.<sup>7</sup> Local authorities in certain cases may make by-laws controlling the undertakers in the interests of public safety, subject to confirmation by a superior authority.<sup>8</sup>

#### SECTION 4.—PUBLICATION OF BY-LAWS.

**1306.** Unlike statutes, by-laws must be published to become operative.<sup>9</sup> Thereafter knowledge, as in the case of statutes, is presumed. Ignorance of the existence of a by-law, or of its terms, is no excuse. The statute authorising a by-law generally prescribes the manner of its publication. Otherwise some form of public intimation appropriate to the circumstances should be adopted.

<sup>1</sup> *Institute of Patent Agents v. Lockwood*, 1894, 21 R. (H.L.) 61; *Glasgow Insurance Comm. v. Scottish Insurance Commrs.*, 1915 S.C. 504.

<sup>2</sup> *M'Nish v. Weir*, 1904, 6 F. (J.) 68.

<sup>3</sup> *Russell v. Mags. of Hamilton*, 1897, 25 R. 350.

<sup>4</sup> *Taylor v. Nicol*, 1912 S.C. (J.) 38; *Baikie v. Charleson*, 1901, 3 F. (J.) 54.

<sup>5</sup> 10 & 11 Vict. c. 14, ss. 42–49 (Markets); 10 & 11 Vict. c. 27, ss. 83–90 (Harbours).

<sup>6</sup> 8 & 9 Vict. c. 33, ss. 101–104; 3 & 4 Vict. c. 97, ss. 7–9 (Railways); 51 & 52 Vict. c. 25, s. 40 (Canals); 33 & 34 Vict. c. 78, s. 46 (Tramways).

<sup>7</sup> 8 & 9 Vict. c. 17, ss. 127–130; 10 & 11 Vict. c. 16, ss. 96–98.

<sup>8</sup> 33 & 34 Vict. c. 78, s. 46 (Tramways); 45 & 46 Vict. c. 56, s. 6 (Electric Lighting).

<sup>9</sup> *Lumley*, p. 186.



## SECTION 5.—REPEAL, ETC., OF BY-LAW.

**1307.** Modern statutes generally contain special power for the repeal, revocation, or alteration of by-laws made thereunder. The Interpretation Act, 1889, provides<sup>1</sup> that where an Act passed after the commencement of that Act confers a power to make any rules, regulations, or by-laws, the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like consent and conditions, if any, to rescind, revoke, amend, or vary the rules, regulations, or by-laws. At common law the power to make by-laws implied the right to alter or repeal the same in the case of a non-statutory corporation.<sup>2</sup> Repeal of a statute repeals all by-laws made under it unless they are expressly saved in the repealing Act.<sup>3</sup> The body making a by-law may be barred by its actings from enforcing or founding on it.<sup>4</sup>

## SECTION 6.—VALIDITY OF BY-LAWS.

SUBSECTION (1).—*Must be intra vires.*

**1308.** A by-law to be effective must be *intra vires* of the person or body making it. Questions of *intra* or *ultra vires* arise most frequently in reference to by-laws made under statutory powers. Specialties in connection with non-statutory bodies have already been dealt with.<sup>5</sup> The decided cases illustrate fully the circumstances under which the validity of by-laws may be challenged and the principles which guide the Courts in determining as to their validity. The question to be determined is fundamentally the same as the question whether a Company has acted within its memorandum of association, or an arbiter within the bounds of his submission. The statute which confers the power of making by-laws at the same time defines the limits within which the power may be exercised, and any by-law transgressing these limits is bad.<sup>6</sup>

**1309.** There is no power to make by-laws under a statute unless the power is expressly conferred.<sup>7</sup> Where such power is conferred the scope of the by-laws made thereunder can not exceed what is to be derived by reasonable implication from the terms of the power.<sup>8</sup> It

<sup>1</sup> 52 & 53 Vict. c. 63, s. 32 (3).

<sup>2</sup> *Att.-Gen. v. Middleton*, 1751, 2 Ves. Sr. 327, at 329. See also *Bruce v. Ratepayers of Fordington*, 1889, 16 R. 568.

<sup>3</sup> *Watson v. Winch*, [1916] 1 K.B. 688.

<sup>4</sup> *Jennings v. G.N.R. Coy.*, 1865, L.R. 1 Q.B. 7, cf. *Yabbicom v. King*, [1899] 1 Q.B. 444.

<sup>5</sup> Para. 1300, *supra*.

<sup>6</sup> Cases *cit. infra*. See also *Kerr v. Auld*, 1890, 18 R. (J.) 12; *Auld v. Barr*, 1897, 25 R. (J.) 13; *Scott v. Glasgow Corp.*, 1899, 1 F. (H.L.) 51; *Mackenzie v. Somerville*, 1900, 3 F. (J.) 4; *Mackenna v. Sim*, 1916 S.C. (J.) 24.

<sup>7</sup> *Q. v. Wood*, 1855, 5 E. & B. 49.

<sup>8</sup> See *Deuchar v. Gas Light and Coke Company*, [1924] 2 Ch. 426, and leading cases there referred to.



is not, however, always easy to define the precise limits in each individual case. A power to regulate by by-law does not confer a general power to prohibit.<sup>1</sup> Nor can an authority, in prohibiting what they are authorised to prohibit, so exercise their power as to prohibit what they are not authorised to prohibit.<sup>2</sup> Nor can a power to prohibit within any particular locality in an area be extended so as to prohibit within the whole area.<sup>3</sup> On the other hand, a by-law made in the exercise of a power to regulate is not necessarily bad because, in its application to particular circumstances, it amounts to a prohibition or interferes with or destroys rights of property.<sup>4</sup> A power to regulate must, in many cases, be made effective by the appointment of a person to supervise and control; and a by-law to regulate the use of a market-place is not bad because an officer is given power by the by-law to give off stances, and a prohibition is imposed on any person exposing goods for sale on any of the stances without the permission of the officer appointed, or occupying more than the area of the stance allotted to him.<sup>5</sup> Circumstances could be conceived in which a by-law might be held bad because it was not exhaustive.<sup>6</sup>

SUBSECTION (2).—*Must not be repugnant to the General Law.*

**1310.** It is obvious that an authority less than the legislature cannot make a law which contravenes directly, or indirectly, that which is established as general law. Thus by-laws in restraint of trade are in general void, unless authorised by Act of Parliament.<sup>7</sup> A by-law intended to exclude the jurisdiction of the Courts would be void.<sup>8</sup> The rule is generally seen in operation in the case where a by-law infringes a statutory provision contained either in the Act authorising the by-law, or in some other Act, or where it deals with a matter already dealt with by the statute.<sup>9</sup> A by-law is not inconsistent with the general law merely because it forbids the doing of something which might lawfully have been done before, or requires something to be done which there was no previous obligation to do; otherwise a power of making by-laws would

<sup>1</sup> *Municipal Corpn. of City of Toronto v. Virgo*, [1896] App. Ca. 88; *Galloway Saloon Steam Packet Co. v. Kirkcaldy Harbour Comrs.*, 1888, 25 S.L.R. 732; *McGregor v. Disselduff*, 1907 S.C. (J.) 21.

<sup>2</sup> *Rossi v. Mags. of Edinburgh*, 1904, 7 F. (H.L.) 85; *McElfrish v. Barlow*, 1917, J.C. 32.

<sup>3</sup> *Macbeth v. Ashley*, 1874, 1 R. (H.L.) 14; 11 M. 708; cf. *Wilson v. Rust*, 1896, 23 R. (J.) 56.

<sup>4</sup> *Slattery v. Naylor*, 1888, 13 App. Ca. 446; *Da Prato v. Mags. of Partick*, 1907 S.C. (H.L.) 5; *Scott v. Glasgow Corpn.*, 1899, 1 F. (H.L.) 51; *Tewsley v. Central Control Board*, 1918, 1 S.L.T. 123; *Blair v. Smith*, 1924, J.C. 24; *Att.-Gen. v. Hodgson*, [1922] 2 Ch. 429.

<sup>5</sup> *McCall v. Mitchell*, 1911 S.C. (J.) 1; cf. *Nicholls v. Tavistock, Urban Dist. Council*, [1923] 2 Ch. 18.

<sup>6</sup> See *N.B.Rly. Co. v. Cardross Parochial Board*, 1887, 14 R. 478.

<sup>7</sup> *Mitchell v. Reynolds*, Smith's Leading Cases (12th ed.), i. p. 460.

<sup>8</sup> *Kerr v. Hood*, 1907 S.C. 895.

<sup>9</sup> *Dearden v. Townsend*, 1865, L.R. 1 Q.B. 10; *Bentham v. Hoyle*, 1878, 3 Q.B.D. 289; *White v. Morley*, [1899] 2 Q.B. 34; *SS. "Beechgrove" Co. v. Aktieselskabet "Fjord"*, 1916 S.C. (H.L.) 1; *School Board of Barvas v. Macgregor*, 1891, 18 R. 647.

be utterly nugatory.<sup>1</sup> "But it must not alter the general law by making that lawful which the general law makes unlawful; or that unlawful which the general law makes lawful."<sup>2</sup>

SUBSECTION (3).—*Must be Certain.*

**1311.** A by-law must be certain in its enactment. It must afford complete direction to those who have to obey it.<sup>3</sup> Mere ambiguity, however, will not render a by-law bad. It must be reasonably interpreted and in consonance with the subject-matter with which it deals.<sup>4</sup> Expressions used in a by-law must, unless the contrary intention appears, be given the same respective meanings as in the Act conferring the power.<sup>5</sup> A penalty imposed by a by-law may be sufficiently fixed by reference to some standard,<sup>6</sup> ascertainable on reference to the statute or otherwise.

SUBSECTION (4).—*Must apply to all Persons within its Scope Equally and Indiscriminately.*<sup>7</sup>

**1312.** A by-law must not be made for the benefit or to the detriment of any particular person. As expressed, the rule is perhaps but an aspect of the rule that follows, viz., that a by-law must be reasonable.<sup>7</sup> It does not follow that a by-law is bad because its operation affects some persons more hardly than others.<sup>8</sup>

SUBSECTION (5).—*Must be Reasonable.*

**1313.** A by-law may be within the terms of the powers delegated to a local, or other, authority, and yet be bad on the ground that it is unreasonable.<sup>9</sup> Thus a by-law putting it in the power of any three inhabitant householders to prevent the erection of a booth in a public place within 100 yards of their residences was held unreasonable.<sup>10</sup> Where a by-law imposed on landlords of lodging-houses a duty to cleanse the lodging-houses three times a year, and applied to a landlord who had let his lodging-house and so had no right of entry, it was held

<sup>1</sup> *Edmonds v. Watermen's Company*, 1855, 24 L.J. (M.C.) 124, at 128.

<sup>2</sup> *White v. Morley*, [1899] 2 Q.B. 34, per Channell J. at p. 39. See also *Gentel v. Rapps*, [1902] 1 K.B. 160 at 166.

<sup>3</sup> *Dunsmore v. Lindsay*, 1903, 6 F. (J.) 14; *Kruse v. Johnson*, [1898] 2 Q.B. 91, at 108; *Att.-Gen. v. Denby*, [1925] 1 Ch. 598.

<sup>4</sup> *Rutherford v. Somerville*, 1901, 4 F. (J.) 15; *Q. v. Saddlers' Co.*, 1863, 10 H.L.C. 404; *Dearden v. Townsend*, 1865, L.R., 1 Q.B. 10.

<sup>5</sup> 52 & 53 Vict. c. 63, s. 31.

<sup>6</sup> *Brown v. Great Eastern Rly.*, 1877, 2 Q.B.D. 406; cf. *Saunders v. S.E.Rly.*, 1880, 5 Q.B.D. 456.

<sup>7</sup> *Kruse v. Johnson*, [1898] 2 Q.B. 91, at 99.

<sup>8</sup> *Slattery v. Naylor*, 1888, 13 App. Ca. 446, and other cases *cit. sup.* p. 531, note 4.

<sup>9</sup> *Dunsmore v. Lindsay*, 1903, 6 F. (J.) 14; *Elwood v. Bullock*, 1844, 6 A. & E. 383; *Stiles v. Galinski*, [1904] 1 K.B. 615; *Arlidge v. Islington Corpn.*, [1909] 2 K.B. 127; *Repton School Gorrs. v. Repton R.D.C.*, [1918] 2 K.B. 133; *Att.-Gen. v. Denby*, [1925] 1 Ch. 596.

<sup>10</sup> *Elwood v. Bullock*, *supra*.

that the by-law was unreasonable and bad.<sup>1</sup> So also it has been held unreasonable that a by-law should prescribe that a new building should have an unbuilt-on space of 150 square feet at the back exclusively belonging to that building so as to apply to a new building built on a site facing the open sea and having at its back and one side a public park.<sup>2</sup> But a by-law was held not unreasonable which compelled a passenger, who had bought a ticket for a complete journey, to have his ticket checked at an intermediate stage of the journey ;<sup>3</sup> or which provided that no person should convey material of any description along the streets or courts of a burgh in carts or carriages so loaded that any part of the load should fall on any street or court within the burgh.<sup>4</sup> A by-law of a corporation excluding persons, otherwise eligible, from membership if they are insolvent is reasonable if the insolvency referred to is public insolvency, but would seem to be bad, as being unreasonable, if intended to apply to a person who is unable at any moment to meet his liabilities in full.<sup>5</sup>

**1314.** "By-laws made to cramp trade in general are void; by-laws made to restrain trade in order to the better government and regulation of it are good in some cases, viz., if they are for the benefit of the place, or to avoid public inconveniences, nuisances, etc., or for the advantage of the trade and improvement of the commodity." <sup>6</sup> A by-law may be held unreasonable if it is oppressive, or curtails the liberties of individuals more than is necessary to give effect to the object which it has in view.<sup>7</sup> Since the cases last cited the doctrine of reasonableness has been considerably developed in relation to the exercise by local authorities of their powers to make by-laws. A by-law made by a local authority is not to be treated as unreasonable merely because it does not contain qualifications which commend themselves to the minds of judges.<sup>8</sup> And a by-law made under the usual safeguards which attach to the making of by-laws by a local authority will not be lightly set aside except in an extreme case.<sup>8</sup> A by-law which may impose hardship or inconvenience upon an individual is not unreasonable if it is for the general good.<sup>9</sup> What is reasonable in one locality may not be so as

<sup>1</sup> *Arlidge v. Islington Corpn.*, [1909] 2 K.B. 127.

<sup>2</sup> *Att.-Gen. v. Denby*, [1925] 1 Ch. 596.

<sup>3</sup> *Apthorpe v. Edinburgh Street Tramways Co.*, 1882, 10 R. 344.

<sup>4</sup> *Ronaldson v. Williamson*, 1911 S.C. (J.) 102; see also *M'Call v. Mitchell*, 1911 S.C. (J.) 1; *Rae v. Hamilton*, 1904, 6 F. (J.) 42.

<sup>5</sup> *Q. v. Saddlers' Company*, 1863, 10 H.L.C. 404.

<sup>6</sup> *Mitchell v. Reynolds*, 1 P. Wms. 184, per Parker, C.J. *Smith's Leading Cases* (12th ed.), vol. i. p. 460.

<sup>7</sup> *Johnson v. Mayor, etc. of Croydon*, 1886, 16 Q.B.D. 708; *Munro v. Watson*, 1887, 57 L.T. 366.

<sup>8</sup> *Slattery v. Naylor*, 1888, 13 App. Ca. 446, at 451, 452, 453; *Kruse v. Johnson*, [1898] 2 Q.B. 91, at 97, 98, 99, 100, 104; *White v. Morley*, [1899] 2 Q.B. 34; *Salt v. Scott Hall*, [1903] 2 K.B. 245; *Att.-Gen. v. Hodgson*, [1922] 2 Ch. 429; see also *Da Prato v. Mags. of Partick*, 1907 S.C. (H.L.) 5, per Loreburn, L.C.

<sup>9</sup> *Hendon Local Board v. Pounce*, 1889, 42 Ch. D. 602; *District Council of Barton Regis v. Stevens*, 1896, 12 T.L.R. 367; *Simmons v. Malling Rural Council*, [1897] 2 Q.B. 433, at 438; and cases *cit. sup.* p. 531, note 4.

to another, because of the different circumstances of the two districts.<sup>1</sup> A by-law may be unreasonable by nature of the penalty attached.<sup>2</sup>

SUBSECTION (6).—*Prescribed Procedure must be followed.*

**1315.** A by-law is effective only where the prescribed procedure for its making has been followed.<sup>3</sup> But where the statute enacts that a by-law when confirmed shall have the effect of an Act of Parliament, it is not open to enquire into the preliminary procedure.<sup>4</sup> A provision that a by-law shall be laid before Parliament does not *per se* prevent the by-law becoming effective until the provision is complied with.<sup>5</sup> Production in any proceedings of a by-law made by a public body under statutory powers is *prima facie* evidence of the due making, confirmation, and existence of such by-law, and is conclusive evidence of these facts if not challenged.<sup>6</sup>

SUBSECTION (7).—*Partial Invalidity.*

**1316.** A by-law may be valid in part and in part invalid. The application of this rule depends on the severability of the by-law. If the good can be severed from the bad and be made independently operative it will receive effect.<sup>7</sup> But if a by-law “being entire” is invalid in any particular it is wholly void.<sup>8</sup>

SECTION 7.—ENFORCEMENT OF BY-LAWS.

**1317.** By-laws are generally enforced by means of a monetary penalty, the penalty being prescribed, or a maximum fixed, by the statute.<sup>9</sup> The penalty of imprisonment is rarely authorised except in special cases, *e.g.* during the recent war.<sup>10</sup> A common-law corporation can attach the sanction of a penalty to its by-laws as an ordinary incident of its power to make by-laws.<sup>11</sup> It can not impose the penalty of imprisonment.<sup>12</sup> Imprisonment on failure to pay a penalty for a police offence has been upheld though the statute did not authorise the

<sup>1</sup> *Heap v. Burnley Union*, 1884, 12 Q.B.D. 617.

<sup>2</sup> *Saunders v. S.E. Rly.*, 1880, 5 Q.B.D. 456.

<sup>3</sup> *Metcalfe v. Cox*, 1895, 22 R. (H.L.) 13; *Dundee Combination Parish Council v. Secretary for Scotland*, 1901, 3 F. 848.

<sup>4</sup> *Hamilton v. Fyfe*, 1907 S.C. (J.) 79.

<sup>5</sup> *Hepburn v. Wilson*, 1901, 4 F. (J.) 18.

<sup>6</sup> 8 Edw. VII. c. 65, ss. 38 (2), 2.

<sup>7</sup> *Clark v. Denton*, 1830, 1 B. & A. 92, at 95; *R. v. Faversham*, 1799, 8 T.R. 359; *R. v. Lundie*, 1862, 10 W.R. 267; *Dyson v. L. & N.W. Rly. Co.*, 1881, 7 Q.B.D. 32, at 36, 37; *Strickland v. Hayes*, [1896] 1 Q.B. 290, at 292.

<sup>8</sup> *Saunders v. S.E. Rly. Co.*, 1880, 5 Q.B.D. 456, at 463; Grant on Corporations, p. 88, and cases there cited.

<sup>9</sup> *E.g.* 55 & 56 Vict. c. 55, cf. ss. 309 and 317; 60 & 61 Vict. c. 38, ss. 87 and 184.

<sup>10</sup> See *Mackenna v. Sim*, 1916 S.C. (J.) 24.

<sup>11</sup> Lumley, p. 217.

<sup>12</sup> *Clark's Case*, 1596, 1 Co. Rep., pt. v. 64a; 3 Coke 129 (ed. 1826).



alternative of imprisonment.<sup>1</sup> It may be doubted whether this case would be followed. But the point would seem to be now covered by the Summary Jurisdiction (Scotland) Act, 1908.<sup>2</sup> By-laws in certain cases may also be enforced by the removal of the offender, or by the cancellation or suspension of his licence. Where an offence is committed under two or more Acts, or under an Act and at common law, the offender may not, unless the contrary intention appears, be punished twice for the same offence.<sup>3</sup> It is the duty of a local authority to enforce its by-laws and *ultra vires* of it to waive them or act in contravention of their terms.<sup>4</sup>

**1318.** A by-law having territorial application applies to all who come within the area of its operation, and to foreigners as well as to British subjects.<sup>5</sup> The Crown itself may be bound by local by-laws in certain cases, as where, by acquiring heritable property under ordinary feudal tenure or entering into some other civil transaction, it has come within the sphere of operation of a particular by-law.<sup>6</sup>

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<sup>1</sup> *Crighton v. Grant*, 1859, 21 D. 488.

<sup>2</sup> 8 Edw. VII. c. 65, ss. 2, 47, 48.

<sup>3</sup> 52 & 53 Vict. c. 63, s. 33.

<sup>4</sup> *Yabbicom v. King*, [1899] 1 Q.B. 444.

<sup>5</sup> *Croall v. Linton*, 1869, 7 M. 849; *G. & S.W. Rly. v. Mags. of Saltcoats*, 1906, 14 S.L.T. 560; cf. *Mortensen v. Peters*, 1906, 8 F. (J.) 93; cf. *Gairns v. Main*, 1888, 15 R. (J.) 51.

<sup>6</sup> *Somerville v. Id. Adv.*, 1893, 20 R. 1050; *Mags. of Edinburgh v. Ld. Adv.*, 1912 S.C. 1085.

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## C.F.I.

See SALE.

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## CAB.

See CARRIAGE BY LAND.

# CABINET, THE.

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### SECTION 1.—INTRODUCTION.

**1319.** The Cabinet has come to be the pivot of the whole machinery of government in this country. It has not only become in itself the Executive, through its power to wield the Royal Prerogative, but it has come to have a dominating power in the legislature.

### SECTION 2.—COMPOSITION OF CABINET.

**1320.** The Cabinet consists of the Prime Minister and those whom he selects to be associated with him. There is this notable distinction between his position and theirs, that he is chosen by the Sovereign while they are chosen by him. The position of the Prime Minister is unique among the Ministers. His selection is almost the last of the royal functions which a king may perform without the advice of a responsible Minister. There did indeed grow up during the earlier half of last century a practice whereby the Sovereign consulted a retiring Premier as to the selection of his successor; but the strong personal preferences of Queen Victoria were given effect to on at least one occasion in a personal choice,<sup>1</sup> and the practice of acting on advice did not harden into a constitutional rule. The actual choice of the Sovereign is, however, in practice very narrowly circumscribed. To be effective, the choice must fall on a man who will command the confidence and support of the House of Commons. This generally restricts the Sovereign to taking the acknowledged leader of the dominant party in the House. Yet it may happen, especially on the death or retirement of a party leader, that there are two or even more possible “leaders” among the prominent men of the party, any one of whom the party will follow, and that an effective choice among them may be made by the personal selection of the Sovereign. Such were the circumstances in which Queen Victoria acted in 1894.<sup>1</sup>

GENERAL AUTHORITIES.—Lowell, Government of England; Todd, Parliamentary Government in England; Sidney Low, Governance of England.

<sup>1</sup> Morley's Gladstone, iii. 572.

**1321.** The position of First or Prime Minister was for long unknown to the law and was not officially recognised. It has now at least the official recognition of a rank in the order of precedence: by royal warrant dated 2nd December 1905 the holder takes place and precedence immediately after the Archbishop of York.<sup>1</sup> The Premiership is in fact not an office recognised by law; it has neither salary nor duties; but the Prime Minister receives remuneration in the form of a salary attached to a sinecure office held by him—generally that of First Lord of the Treasury. By invariable practice he must be a member of one or other House of Parliament.

**1322.** The first duty of a newly appointed Prime Minister is to fill the places in his Ministry—that is to say, he submits to the Sovereign for ratification the names of persons selected by him to fill the large number of offices which change hands upon every change in the dominant party in the House of Commons. Their number is very large, including the heads, and often subheads, of all departments of government, and the law officers of the Crown. It is from this greater body who form the Ministry that the Prime Minister selects those who are to form the inner council which is called the Cabinet. His choice is much restricted by the unwritten rule of practice that the holders of certain offices are always included. Among these are the Lord President of the Council, the Lord Chancellor, the Lord Privy Seal (often combined with some other office), the Chancellor of the Exchequer, the First Lord of the Admiralty, and all the Secretaries of State, who now number eight.

**1323.** The ancient office of Secretary of State represents the “clerk” or secretary who always accompanied the early Kings of England. The present title dates from the reign of Elizabeth. Until the time of Henry VIII. there was only one Secretary of State, but the subdivision of the office has proceeded so far that there are now eight; and the functions have been divided among them. But each of them is still officially described as a Principal Secretary of State; and it is competent for any one of them to perform all the duties (with few statutory exceptions) of the office, so that the subdivision of the duties is a mere matter of convenience and does not restrict the legal powers of each. Since the Secretaries of State Act, 1926,<sup>2</sup> which fixed the present number of Secretaries, they have been the Secretaries of State for the Home Department, for Foreign Affairs, for Colonial Affairs, for War, for India, for Air, for the Dominions (at present held by the Colonial Secretary),<sup>3</sup> and for Scotland. Of these not more than six may be members of the House of Commons.

**1324.** There have been instances of men being included in the Cabinet although they held no office; but this practice of making “Ministers without portfolio” has not been much resorted to in this country owing to the number of sinecure offices which are available for

<sup>1</sup> London Gazette, 2nd Dec. 1905.

<sup>2</sup> 16 & 17 Geo. V. c. 18.

<sup>3</sup> Hansard (H. of C.), 1925, vol. clxxxiv. col. 2239; vol. clxxxvii. col. 69.

bestowal on men who are wanted by the Prime Minister in a consultative rather than an administrative capacity.

**1325.** After their selection by the Prime Minister the members of a new Cabinet are admitted to their respective offices, generally at a meeting of Privy Council, by the appropriate forms, such as delivery to them of seals or other symbols of office, and the kissing of the King's hand. All are, or on admission to Cabinet rank become, members of the Privy Council.

### SECTION 3.—RELATIONS OF CABINET TO CROWN.

**1326.** The outstanding position of the Prime Minister in the Cabinet is no less marked after than during its formation. All its decisions are communicated to the Sovereign by the Prime Minister; all communications from the Sovereign are transmitted through him. It is true that each member may hold direct communication with the Sovereign upon the affairs of his own department of government; but he is not entitled to discuss the proceedings at Cabinet meetings. This rule of practice arises almost inevitably from the fundamental rule that the Cabinet always speaks with a united voice. Whatever be the differences of view formulated at its meetings or expressed at its debates, the resulting decisions must be the decisions of the Cabinet as a whole. Dissentients must acquiesce or resign. The advice given to the Crown, or the decisions on policy arrived at, are spoken through the Prime Minister as the mouthpiece of the Cabinet.

**1327.** Since the powers of "the Crown" have been in recent times greatly extended by statute, and since these powers are not exercised by the King in person, but by the Cabinet, the latter body has come to form the real executive power in the State through the fact that it wields all the powers of the Royal Prerogative. In saying this, however, there should be added that very many decisions which involve only one of the departments will be taken by the head of the department concerned without reference to his colleagues, or at the most after consultation with the Prime Minister. Whether a matter of departmental administration should be made a Cabinet question or not is commonly decided in the first instance by the Minister directly concerned; but the Prime Minister may himself decide that some departmental matter should not be determined except after consultation by the Cabinet. Among the considerations which might determine the question are the intrinsic importance of the decision, the risks of incurring criticism of the proposed policy in Parliament or in the country, the possible effects of the policy on other departments, and the necessity for preparing a public defence or vindication.

**1328.** The personal influence of the Sovereign in the work of government has been diminishing for a long time; but it is difficult to indicate its extent owing to the fact that, being a persuasive and not a mandatory influence, it depends on the character and personality of the monarch. The King is entitled to be informed of all matters which come before the



Cabinet and to an opportunity of discussing such topics with the Prime Minister. Queen Victoria on several occasions by her personal influence persuaded her Ministers to reconsider their decisions; and in the sphere of foreign affairs she maintained, in a controversy with Lord Palmerston in 1850, her right to see the dispatches of her Foreign Minister before, and not merely after, they were sent. On the other hand, the Sovereign has no personal power to dictate or to override the policy of his Cabinet; and he is bound by modern constitutional practice to give his sole and exclusive confidence in public affairs to his responsible Ministers. Such intriguing with Opposition politicians against Ministers as was habitually indulged in by George III. would now be regarded as unconstitutional practice on the part of a Sovereign. A certain mediatory influence may, indeed, be exercised by him between conflicting political parties in times of crisis; but this is done with the knowledge and consent of the Prime Minister. Instances of such intervention occurred in Victoria's reign in connection with the Reform Bill agitation in 1867, and the Irish Disestablishment crisis in 1869. A similar instance occurred when King George V. intervened in the Irish Home Rule controversy in 1914.

**1329.** The power of the Sovereign to dismiss a Ministry was one of the last of the personal and irresponsible powers which the Crown retained. This power may probably be said no longer to exist. As the successors of the dismissed Ministers must obtain the confidence of the House of Commons, such a dismissal would generally have to be accompanied by a dissolution of Parliament, and would be, in substance, an appeal by the Sovereign from his Ministry to the electors. This was done by George III. in 1784 and in 1807; but when William IV. dismissed Grey's Ministry the new House of Commons contained a Whig majority, and Grey returned to power. This is the last instance of the Sovereign dismissing a Ministry and forcing a dissolution.

**1330.** While it is in a very real sense true that the Cabinet has come to be the Executive, yet (more strictly viewed) the Cabinet as a body takes no action; its function is purely deliberative. The decisions arrived at in Cabinet meeting have to be given effect to by the action of the appropriate department. In a legal sense the responsibility must be taken by the Minister concerned, not by the Cabinet; in a political sense the responsibility will be held to rest on the Cabinet, whose members must defend the actings of their colleague, since their resignations will all be involved in a censure of his action by the House of Commons.

#### SECTION 4.—RELATIONS TO PARLIAMENT.

**1331.** The detached position of the Sovereign and his freedom from the criticism incurred by the acts done in his name are achieved by the full acceptance of the doctrine of ministerial responsibility. No act of State can be done except on the authority of some responsible Minister. Thus, the "necessary and sufficient authority" for passing any instru-

ment under the Great Seal is the Royal Sign Manual, countersigned by the appropriate Minister.<sup>1</sup> The function of criticism of public affairs, which is found very early in the history of Parliament and has now come almost to overshadow its original legislative function, consists therefore now in a right and a duty to criticise the conduct, not of the King, but of the King's Ministers. Every member of the Cabinet is (with rare and short-lived exceptions) a member of one or other House of Parliament, so that the Cabinet has sometimes been loosely described as a committee of the legislature. In truth the method of selection of the Cabinet (described above) secures to Parliament—or rather, to the House of Commons—a powerful but an indirect influence over its composition. The continued existence of a Cabinet depends at every stage on the support of the House of Commons; and thus the approval of the majority of that House is one of the essential considerations affecting the Prime Minister's selection of his colleagues. The tendency (which is marked in some British Colonies) for the actual selection of Ministers to be made by a party organisation outside of Parliament has not been openly exhibited yet in this country.

**1332.** The dependence of the Cabinet on the support of the Commons has been undergoing a marked change in recent times. At a time not yet very remote this dependence might have been described in the proposition that a censure by the Commons of any administrative act of the government involved instant resignation of the whole Ministry. Now, the Cabinet is invariably installed in office as the head of a political party pledged to achieve legislative changes, controlling the machinery of Parliament, and requiring a parliamentary majority for carrying out its legislative pledges. In this way the relations of the Cabinet and the Commons have become much closer than they were in the middle of the nineteenth century. It would, however, be less true to say that the Commons have a closer control of the Cabinet than to say that the latter has acquired a predominant influence in Parliament. The time of Parliament has in recent years been so completely taken for the consideration of Bills promoted by government departments that practically no public legislation reaches the statute book which is not directly promoted by the Executive. In this way the separation of the executive and the legislative functions of government has almost entirely disappeared. The one no less than the other is controlled by the Cabinet. The Prime Minister, if he sit in the House of Commons, is generally the "leader of the House"; and that House has now come to eclipse the other House so completely in power and influence that many observers anticipate that no peer will again occupy the position of Prime Minister. If, however, the Prime Minister is in the Lords, some other Minister takes the position of "leader" of the lower House; but by virtue of that fact he tends to approach, if not to surpass, the Prime Minister in authority and influence.

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<sup>1</sup> Great Seal Act, 1884 (47 & 48 Vict. c. 30).

**1333.** In the House of Commons each department of State is represented by either its Chief or an Under-Secretary, who answers questions, replies to criticisms, and presents and defends the estimates of the department. On matters of general policy, not merely departmental in character, the case for the government is put in debate by the leader of the House or by such of his colleagues as may be arranged for to take part in debate.

#### SECTION 5.—RELATIONS TO THE ELECTORATE.

**1334.** The position of the Cabinet has been materially affected by the development of the Party System. The political parties have grown during the last half-century in cohesion and in the strength and elaboration of their organisation. One result of this has been to magnify the Cabinet at the expense of the Commons. Since the Cabinet is ruled over by a party leader, and his colleagues are among the prominent figures in the party, the Cabinet has come to be an important committee of that party which is dominant for the time being. Its appeal for support and for approval of its policy is now made less to its followers in the House of Commons than to its supporters among the Electorate. Through the party organisation the principal Ministers are brought into close touch with the voters, and make their political appeal direct to them instead of to the House of Commons. Important statements of public policy, often initiating movements of legislative reform, which fifty years ago would have been made always in Parliament, are now habitually made upon a public platform in a direct appeal to the electors. In this way a marked tendency has become manifest to bring the Ministry into direct and close contact with the Electorate, and thereby to diminish the constitutional weight of the House of Commons. The latter body tends to become mere machinery whereby the Electorate places and keeps in office the man of its choice—and thus we seem to be approximating to the presidential system of government.

#### SECTION 6.—INTERNAL ARRANGEMENTS.

**1335.** Until recently the Cabinet had long been the most informal of committees. Summoned by the Prime Minister, it had no secretary, minutes, or record of proceedings. Every member was debarred from making any public reference to what passed at its meetings. Even the making of notes at the meeting was regarded as prohibited. To this last there was an exception in the case of the Prime Minister; for to him fell the duty of communicating the views and decisions of the Cabinet to the Sovereign. It is not, however, any part of his duty—nor probably permissible—to convey particulars of individual views expressed, or of cleavages of opinion disclosed, at Cabinet meetings. The position of members of a Cabinet was summarised by Gladstone, in reproving a member who had referred in public to what had happened in the Cabinet,



in these words: "It cannot have occurred to you that the Cabinet is the operative part of the Privy Council, that the Privy Councillor's oath is applicable to its proceedings, that this is a very high obligation, and that no one can dispense with it except the Queen. I may add that I believe no one is entitled even to make a note of the proceedings except the Prime Minister, who has to report its proceedings on every occasion of its meeting to the Queen, and who must by a few scraps assist his memory."<sup>1</sup> The Privy Councillor's oath here referred to includes the words: "and [you] shall keep secret all matters committed and revealed unto you or that shall be treated of secretly in Council." The application of this oath to Cabinet secrecy depends on the identification of that body with the Privy Council, and Gladstone was probably in error in basing the obligation of secrecy on the oath which every member of the Cabinet had taken—not as a Cabinet Minister, but as a Privy Councillor. A meeting of the Cabinet is not a meeting of the Privy Council.

**1336.** The normal course of Cabinet government was interrupted during the Great War. Upon a change of Premier in December 1916, the Cabinet in the familiar sense, as including all the heads of important departments of the administration (as explained above), ceased to function. A so-called War Cabinet was organised, consisting of about six persons, who held no administrative offices. This was expanded, as occasion required, into the "Imperial War Cabinet" by the inclusion of certain statesmen from the Dominions. This system suffered from the lack of co-ordination among the departments not directly connected with the War, and this evil was attempted to be remedied by the institution in June 1918 of a "Standing Committee of Home Affairs," whose function was to consider matters of internal policy which involved the co-operation of more than one department; but its decisions were circulated to, and were subject to revision by, the "War Cabinet." In October 1919 the War Cabinet and the Home Affairs Committee were dissolved, and a return was made to the normal Cabinet of about twenty members as already described.

**1337.** The temporary war-time disturbance of the normal course of Cabinet government has, however, left one important effect on its internal organisation, which promises to be permanent. The War Cabinet established a Secretariat and made provision for the recording of its decisions. This was, to some extent, a reversion to the practice of eighteenth-century Cabinets. There seem to have been minutes of Cabinet meetings in the reign of George III., but at some time early in the nineteenth century the practice had been given up. The informality and the absence of any record of decisions, which had characterised the Cabinets of the nineteenth century, were considered by some of the statesmen of the war-period as unsuitable for the larger Cabinets and more multifarious business even in times of peace. The system whereby the

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<sup>1</sup> Morley's Gladstone, iii. 114.



Cabinet had no agenda, and a member had to get the sanction of the Prime Minister to bring forward any business, while no one knew in advance what the business was to be nor had any authentic record of the decisions arrived at, was severely condemned by some of those who had tried to work it. Even before the war "the old Cabinet system had (in their view) irretrievably broken down."<sup>1</sup> Under that system a Minister was expected to carry in his mind the decision reached on any matter which concerned his department, and to record it only on his return to his office. Another Minister affected by the decision might carry from the meeting a different impression of his colleagues' views. Confusion, it was said, was thus introduced into the administration.<sup>1</sup> It was with a view to remedy such evils that the Secretariat which had been introduced during the war was continued, and made a permanent part of the constitutional machinery. Now, the summoning of the meeting, which was formerly done by the Prime Minister's private secretary, is done by the Secretary to the Cabinet on the instructions of the Prime Minister, an agenda of business is circulated among the members, and the Secretary attends the meetings. The Cabinet Secretary is the same individual as the Clerk to the Privy Council, thus renewing the ancient historical connection of these two bodies. The minutes taken and recorded by the Secretary are confined to the conclusions or decisions; no record is taken, or note kept, of the speeches made or opinions expressed.<sup>2</sup> The decisions are communicated by the Secretary to the departments affected by them, which thus obtain an authentic record of the resolutions on which they may have to take action.<sup>3</sup>

#### SECTION 7.—DISSOLUTION OF CABINET.

**1338.** So close is the dependence of a Cabinet on its official head that, while other members may resign and be replaced without affecting the position of their colleagues, the resignation or the death of the Prime Minister involves the dissolution of the Cabinet. And this is as true of a resignation on private and personal grounds as of his political defeat. Thus a new Prime Minister always chooses his own Cabinet, whatever private and political influences may tend to make him retain, or re-appoint, as colleagues the members of a former Cabinet.

#### SECTION 8.—HISTORY.

**1339.** In Tudor and Stuart times the recognised advisers of the English Kings were those who formed the Privy Council. Though

<sup>1</sup> Lord Curzon, in Hansard (H.L.), 19th June 1918, xxx. 265.

<sup>2</sup> Mr. Lloyd George, Hansard (H.C.), 13th June 1922, clv. 265.

<sup>3</sup> The new arrangements have not been accepted without criticism, even among those well entitled to judge of their value. See debate in House of Commons, Hansard, 13th June 1922.

individually nominated by the King they were known to, and recognised by, Parliament. The earliest beginnings of a "Cabinet" council distinct from the Privy Council are found in a practice, adopted by certain kings, of treating as the special repositories of their State secrets a small number of privileged members of the Privy Council to the exclusion of that body as a whole. This selection of an inner circle of more intimate advisers was rendered necessary by the fact that the Privy Council had grown too large for the efficient conduct of business; but it was even more imperatively required by the character of the Stuart policy in opposition to the Parliament; for this could not be successfully entrusted to any but the King's intimate confidants. It is due to this latter fact that every early reference to the King's inner council of intimate advisers—whether as a "Cabinet" or other designation—is inspired by dislike and expressive of opprobrium. Bacon, Clarendon, and other writers express the general disapproval; terms expressive of this attitude at different times were "junto," "cabal," "cabinet." The essential ground of objection seems to have been the fact that no man knew who were the principal advisers of the King, and that consequently they were immune from Parliamentary and other criticism for the advice which they might give him.

**1340.** The Revolution made little immediate change in the relations of the Crown and its advisers. William III. had his inner circle of intimate advisers—now generally known as the "Cabinet" council. Its unpopularity as a mode of government was undiminished. The same criticisms were directed against the Cabinets of William as against those of his Stuart predecessors. It was this dislike of Cabinet government which led to the provision of the Act of Settlement, 1700,<sup>1</sup> that after the succession of the House of Hanover "all matters and things relating to the well governing of this kingdom, which are properly cognizable in the Privy Council by the laws and customs of this realm, shall be transacted there, and all resolutions taken thereupon shall be signed by such of the Privy Council as shall advise and consent to the same." This enactment never became operative; for in 1705, before the occasion which should have called it forth, it was repealed.<sup>2</sup> The proposal of the Act of Settlement to resuscitate the Privy Council was dictated by the desire to have the King's advisers known to Parliament and amenable to its criticism; but it would be a misreading of the ideas of the time to read into it a modern conception of ministerial responsibility. The Parliaments of William did not aspire to usurp the functions of the Executive; these still belonged to the Crown; with the Sovereign rested the ultimate decision; but it was to be a Sovereign advised in the light of day by his known and reputed Councillors, and not by unknown backstairs intriguers.

**1341.** The Cabinets of Stuart Kings and of the earlier years of William's reign were not composed of men of like political views or

<sup>1</sup> 12 & 13 Will. III. c. 2, s. 3.

<sup>2</sup> 4 Anne, c. 8.

necessarily prepared to co-operate harmoniously in carrying on the administration. Even when the division of politicians into fairly well-defined party associations, as Whig and Tory, had been introduced by the struggle over the Exclusion Bills, the group of persons who formed a Cabinet were not all of one party. William, owing his crown to a temporary alliance—or at least co-operation—of the Whigs and Tories, shewed a marked preference for a mixed ministry; but even in his time the impossibility of efficient and harmonious administration under such a Cabinet was becoming apparent. In the following reign the transition from mixed Ministries to a Cabinet homogeneous in political complexion is more marked. Anne, like her predecessors, and notwithstanding her own Tory predilections, preferred the system of a mixed Cabinet. But circumstances were against her. In the first eight years of her reign the administration was first Tory, then mixed Whig and Tory, and finally exclusively Whig. By 1708 Godolphin had established a complete Whig ascendancy in the councils of the Queen. When the political reaction came, the Queen gladly availed herself of the change in public feeling to replace her Whig advisers by a purely Tory cabinet. But the important fact is that this was rendered possible, indeed necessary, by the large Tory majority in the new House of Commons elected in 1710.

**1342.** By the time of the accession of the House of Hanover, the Cabinet was a well-established institution, as a body of the leading advisers of the Sovereign distinct from the Privy Council. And two important features of modern Cabinet government have begun to force themselves on our notice. First, a Cabinet to be efficient must be politically homogeneous; and, second, a Cabinet has little chance of prolonged life unless it has the support of the House of Commons. Both these facts were direct results of the grouping of politicians into well-defined parties. Ministers were now expected to give harmonious advice to the Sovereign, and to defend that advice in Parliament. The individual responsibility was giving place to that collective responsibility which was to become such a marked feature of the fully developed system; and that responsibility was no longer merely to the King, but was at least beginning to be a responsibility to Parliament. But the process was yet far from complete; and that in several respects. The Cabinet had not yet become the Executive, the power of decision still lay with the Sovereign, he might reject the advice given to him. Also, the dependence of the royal advisers on the approval of Parliament was not yet firmly established; Ministries could exist for a considerable time without the support of the House of Commons, at least when their policy did not require legislation to give effect to it. “Neither the theory, nor the actual rules and marks of this peculiar institution, have been put into shape even by this time; much less was any theory of it present to the minds of statesmen in the eighteenth century. The practice was not uniform, and depended on the cohesion of parties, on the exigencies of the moment, and on the temper or the position of the Sovereign and of



the Minister.”<sup>1</sup> But the most notable contrast between a Cabinet of the early eighteenth century and of the present time consists in the absence at that date of a First, or Prime, Minister. There were differences of rank and precedence in the offices which the Ministers held; there were greater differences in the personal weight and influence wielded by them in the royal counsels; but there was no recognised Prime Minister in the modern sense. Yet traces of such a conception may perhaps be found even in Anne’s reign when a strong-minded Minister like Godolphin forced his reluctant Sovereign to give office to Sunderland in 1706 and later to deprive Harley of his seals.

**1343.** It was due to a combination of circumstances which arose after the accession of the Hanoverian Sovereigns that predominance of one Minister over his colleagues became a recognised feature of our Constitution. George I. and George II. were completely alien in race, sympathies, and speech from the country over which they had come to rule. Up to this time the personal rule of English Sovereigns had been maintained by the fact that they presided in person at the Cabinet board, and there they took the actual personal decisions which determined questions of high policy. Now George I. had not sufficient knowledge of the English tongue to follow the deliberations of his Cabinet, nor perhaps sufficient interest in his British dominions to arouse his lethargic mind to deal with British problems; he therefore refrained from attending meetings of the Cabinet. From that time onwards no king ever took part in its deliberations; one of the Ministers had therefore to act as its president; and the leading Minister of the Cabinet group naturally assumed the presidency, and in time the primacy or leadership which such a position inevitably involved.

**1344.** The hour found the man. In Robert Walpole the Cabinet of George I. contained a man with the gifts of leadership which the occasion demanded. The process of his ascendancy was gradual. From 1720 to 1729 he was associated in the King’s council with Townshend, a personal friend but not always a congenial colleague, who, as Secretary of State, conducted foreign affairs as he pleased without much reference to Walpole or the other Ministers. But the complicated state of European diplomacy, and its important bearing on Home affairs through the Jacobite intrigues abroad, rendered the separation of administration into water-tight compartments impracticable and dangerous. The logic of the situation demanded unity of policy, and this in turn required a dominating figure in the national councils. Walpole had risen by ability and character to be the foremost man in the House of Commons. To him it fell to defend the government policy, including some of Townshend’s foreign designs of which he disapproved. He claimed that the man who had not only to finance the operations, but to win the approval of the House, should have a dominant voice in determining the policy. In 1729 the resignation of Townshend left to Walpole an unchallenged

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<sup>1</sup> Morley’s Walpole, p. 142.



leadership in the Cabinet. Though he denied the impeachment, he was in fact the first Prime Minister. He was also directing the lines of future development of the Constitution in another way. Walpole insisted on keeping a party faithful to himself and his government under strict discipline in the Commons. He employed the patronage of the Crown, which he controlled, to secure the support of members. He enforced party unity by depriving of their offices all who failed in faithful support of his policy. He thus did much to foster the unity and cohesion of parliamentary parties. The unity of the Cabinet, the primacy of one Minister within it, and its dependence upon the constant support of a party in the House of Commons—these were the lines of constitutional development in which the Cabinet system owes much to Sir Robert Walpole.

**1345.** After Walpole's time the development of the Cabinet was for a time arrested. George III., upon his accession, set himself to destroy both Cabinet government and the party system. He revived the system of personal rule by a king who chose his own advisers but might ignore their advice. There was no political harmony among those whom he selected to administer the various departments. It thus happened that some of his advisers would publicly repudiate the policy commended by other Ministers and acted on by the King. By forming a group of the "King's Friends," whose only policy was support of the King's policy, he largely broke up for the time the division into Whigs and Tories; by corruption of electors on an unprecedented scale he provided a parliamentary majority for any Ministers whom he chose to nominate. With the fall of Lord North in 1782 there was a revival of the homogeneous Cabinet under Rockingham; and when the younger Pitt attained the zenith of his immense popularity he restored in his own person the principle of the ascendancy of one Minister in council and in Parliament.

**1346.** In the early years of the nineteenth century some important principles of Cabinet government were established, which have formed the rules of subsequent practice. Thus, the modern rule that the Prime Minister chooses his own colleagues, the rule that the King may not attach to a Minister's appointment any conditions as to the advice which he will give, the rule that the King is not entitled to inquire as to the lines of division within the Cabinet or the attitude assumed by any individual Minister in Cabinet meetings—these were settled in that important period. The opposition of George IV. to Catholic emancipation was the last successful effort of a Sovereign to override the advice of responsible Ministers; and the dismissal of the Whig Ministry by William IV. in 1835, which led to their triumphant return with an increased parliamentary majority, was the last instance of a dismissal by the King of a Ministry enjoying the confidence of the House of Commons. The dependence of a Ministry on the pleasure of the House of Commons was formally recognised early in the next reign, when a vote of censure (1841) on the Whig Ministry, after narrating that they had not the confidence of the House, concluded that "their continuance in office, under such circumstances, was at variance with the spirit of the Constitution."

## CANALS.

*See* RAILWAYS AND CANALS.

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## CANCELLATION.

*See* DEEDS.

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## CANDIDATE.

*See* ELECTION LAW.

# CANON LAW.

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### SECTION 1.—INTRODUCTION.

**1347.** The Canon Law, or the law contained in the *Corpus Juris Canonici*, was compiled under the authority of the early Church of Rome. It consists of two main portions, the *Decretum* and the *Decretals*. The first was the work of Gratian, a monk of Bologna, and was compiled towards the middle of the twelfth century. Up to that time the canon law was regarded as a branch of theology, and was studied only in the seminaries attached to cathedrals and monasteries. During its growth the Church had extended her influence into all departments of life, and her legislation embraced many subjects belonging to the domain of municipal law.

### SECTION 2.—THE DECRETUM.

**1348.** It was Gratian who first taught the canon law as a separate science. Having selected the whole subsisting law of the Church from among the mass of canons, decretals, writings of the Fathers, and the works of the ecclesiastical historians, he arranged it in one systematic work, since called after him, the *Decretum Gratiani* (1139-42), which soon superseded all previous compilations. The work consists of three parts. The first deals with the sources of canon law, and with ecclesiastical persons and offices, and is divided into 101 *distinctiones*, which are subdivided into canons. The second part is composed of *causae* or cases proponed for solution, subdivided into *questiones*, or questions, under which are arranged the various canons bearing on the question. The third part, which is entitled *De Consecratione*, gives, in five *distinctiones*, the law bearing on Church ritual and the sacraments.

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GENERAL AUTHORITIES.—The best edition of the *Corpus Juris Canonici* is that by Friedberg, published at Leipzig in 1879. The early canon law of marriage is best studied in Freisen's *Geschichte des Canonischen Eherechts*. Of the later commentators, Sanchez is the most authoritative. Walter's *Kirchenrecht* is a useful compendium of the different ecclesiastical systems of law. A recent English work on the subject is that of Reichel, published in London in 1896. For a list of the leading authorities, see Fraser on *Husband and Wife*.

For purposes of citation the following is the method generally adopted. A reference to the first part indicates the initial words or number of the canon, and the number of the *distinctio*; a reference to the second part gives the canon, *causa*, and *quæstio*; and a reference to the third part cites the canon, and the initial words of the *distinctio*.

Gratian had included in the Decretum the papal decretals down to the year 1139. During the following centuries the pontifical constitutions increased greatly in frequency. These constitutions went by the name of *Decretales Extravagantes* (i.e. Extra Decretum Gratiani Vagantes).

### SECTION 3.—THE DECRETALS.

**1349.** The second part of the Corpus Juris Canonici is composed of the following four collections of decretals:—

(a) Decretals of Gregory IX., promulgated in 1234. Its original name was Libri Extra (*sc.* Decretum), which was abbreviated to X. for convenience in citation; *e.g.* c. 9 X., 4, 13, refers to the 4th book of the Decretals of Gregory, title 13, chapter 9. This collection consists of five books, divided into titles and chapters. The laws are in the form of decisions pronounced in cases submitted to the Pope from all parts of Christendom, and among them are to be found several from England and Scotland.

(b) The *Liber Sextus*, published by Pope Boniface VIII. in 1298. In citing from the *Liber Sextus*, it is usual to give the number of the chapter, with the abbreviation “in vi<sup>to</sup>,” or “in 6,” the number of the book, and the number and rubric of the title.

(c) The *Clementinæ* are the decretals compiled and published by the direction of Pope Clement V. in 1313, and promulgated afresh by his successor, Pope John XXII., in 1317, under the name of Constitutiones Clementis Papæ V., or *Clementinæ*. It is cited by chapter, the words “in Clementinis,” and the number of the book and title.

(d) The *Extravagantes*. The more important of the decretals issued subsequently to the *Clementinæ* were published in two collections, the Extravagantes Joannis XXII. and the Extravagantes Communes. They are respectively cited by the words “Xvag Io XXII.” and “Xvag Comm,” in addition to the chapter, title, and book.

### SECTION 4.—JURISDICTION OF CHURCH COURTS.

**1350.** Throughout the Middle Ages the Church Courts absorbed many departments of civil jurisdiction. All matters connected in the most distant way with the Church or religious duties were dealt with by these tribunals. Thus the Church Courts took cognisance of all questions relating to marriage, succession, and legitimacy. Several causes conduced to the provisions of the canon law being extensively adopted by the law of Scotland. During the sixteenth and seventeenth centuries, the canon law was publicly taught in the Scottish Universities.



A wide jurisdiction was exercised by our Consistorial Courts, from which there was immediate recourse to the ultimate and paramount tribunal of the "Sacri Palatii Apostolici" at Rome. Our consistorial conclusions, *e.g.* decrees in processes of constitution of marriage, divorce *a vinculo*, qualified divorce, legitimacy, and bastardy, etc., profess at that period to be grounded upon *mandata ecclesiæ et sacros canones*, or *constitutiones sacrorum canonum*; while the Pope with us dispensed, either directly or by commission, with nearly the whole canonical restraints upon marriage and legitimacy.

#### SECTION 5.—THE PROVINCIAL COUNCILS.

**1351.** But though one of the *Fontes Juris Scotiæ*, the canon law was never of itself authoritative in Scotland. In the canons of her national Provincial Councils, Scotland possessed a canon law of her own, which was recognised by the Parliament and the Popes, and enforced in the Courts of law. Much of it, no doubt, was borrowed from the *Corpus Juris Canonici*, but the portions so borrowed derived their authority from the Scottish Provincial Councils. "It appears to me," says Lord Robertson,<sup>1</sup> "that these Provincial Councils contain the whole body of the Scotch canon law, and that no part of the general canon law could be part of our law till such time as it was made part of the decrees or acts of that particular system of canon law."

#### SECTION 6.—AUTHORITY IN CONSISTORIAL COURTS.

##### SUBSECTION (1).—*Marriage.*

**1352.** Even after the passing of the Reformation Statutes, which abrogated the papal régime and instituted a lay judicature with exclusive jurisdiction in all consistorial causes, the canon law was still cited in consistorial—or, as they were now styled, commissary—questions, and was constantly referred to and founded upon. Thus, in conformity with the canon law, ignorance on the part of the parties, or of either of them, of the existence of an impediment to a marriage solemnised *in facie ecclesiæ* saved the legitimacy of the issue in the event of the marriage being judicially annulled.<sup>2</sup> It was not so, however, if the marriage had been clandestine or irregular, or if the solemnisation *in facie ecclesiæ* had not taken place until after the discovery of the impediment. Another instance of adoption from the canon law is the law as to promise *cum copula*, which was taken from one of the decretals of Gregory IX. Similarly, proof of cohabitation and habit and repute, which was held by the canon law to be evidence of marriage, was admitted as evidence by an Act of the Scottish Parliament. As to the authority of the canon law in regard to condonation of adultery

<sup>1</sup> Bell's *Rep. Put. Marriage*, p. 178.

<sup>2</sup> See Riddell, i. 452 *et seq.*

and the constitution and dissolution of marriage, see the opinion of Lord Watson in the case of *Collins*.<sup>1</sup>

**1353.** By the canon law a marriage is void if the parties be related within the forbidden degrees, whether those degrees be degrees of blood or degrees of affinity. In the eighth century the Roman Church prohibited marriage between all within the seventh degree, but did not separate married persons within the sixth degree, nor did it enforce this rule strictly in regard to those within the fifth or fourth degree who had married in ignorance of their relationship. All impediments beyond the fourth degree were removed in the thirteenth century by the Fourth Lateran Council, which at the same time not only declared marriages within the fourth degree void, but also pronounced the issue of all such marriages illegitimate. The mode of computing degrees adopted by the canon law is, so far as regards the direct line, the same as that of the civil law—the number of degrees being ascertained by counting the number of degrees up to and including the common stock. Thus a father and a son are one degree distant from each other; and a grandson is two degrees distant from his grandfather. In the oblique line, however, there is an important difference between the Roman and the canon law. By the latter system the computation of the degrees in the equal oblique line is not, as in the Roman system, by counting the number of generations on both sides, but simply the number intervening between either of the parties and the common stock. Thus, by the canon law brothers stand towards each other in the first degree, whereas by the Roman law they are related to each other in the second. By the canon law cousins-german are related to each other in the second degree, because they are only two degrees distant from the common stock, whereas by the Roman law they are related in the fourth. In the unequal oblique line, the number of degrees is found by counting the number of degrees between the common ancestor and the party farthest removed from the common stock. Thus an uncle and nephew stand related to each other, like cousins-german, in the second degree, because the nephew who is farthest removed from the common stock stands in the second degree to the common ancestor. The prohibited degrees recognised by the old consistorial law of Scotland were the same as those prescribed by the canon law, having been made the subject of express enactment by the Provincial Council of 1242.

**1354.** By the canon law a marriage was void which was contracted without consent, *i.e.* contrary to the declared wishes of the parents in the case of minors, or by such violence as precludes consent in the case of adults. Mistake and fraud also rendered marriage voidable, provided they were of such a nature as to prevent proper consent; but it was not voidable if consummation had taken place after the discovery of the mistake or fraud, because consummation under such circumstances was held to imply consent.

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<sup>1</sup> *Collins v. Collins*, 1884, 11 R. (H.L.), 19, at p. 31.

SUBSECTION (2).—*Divorce.*

**1355.** It is the general teaching of the Western Church, that when once lawful wedlock has been contracted and consummated between Christians, it can only be dissolved by the natural death of one of them, or his civil death by the solemn profession of religious life. In the case of adultery, the innocent party is required to separate from the guilty one until the proper term of penance has expired. It is then at his option to receive the offender back or not. In certain cases, however, *e.g.* where both parties are equally guilty, separation for adultery is not allowed. According to the Roman law, marriage between parties who had committed adultery was invalid, and the Church in early times adopted the same rule. But after the ninth century new opinions on this subject supplanted the old, and after being for a considerable time in doubt, the canon law was settled by the formal rescript of Innocent III. Unless, he says, the death of the spouse of the first marriage is brought about by either of the adulterers, or unless, while the first marriage existed, they had promised marriage to each other, the law will allow adulterers to marry each other.

## SECTION 7.—EFFECT OF THE REFORMATION.

**1356.** Many of the rules of the canon law which were adopted by the old Consistorial Courts were largely modified at the Reformation. Thus divorce *a vinculo* was allowed; the 18th chapter of Leviticus was adopted as the law determining the degrees of relationship within which marriage should be legal; and several of the fictions of the canon law, resorted to for the purpose of creating an apparent reconciliation between equity and law, were abandoned. The Reformers, however, though they overturned all the Romish Consistorial Courts, enacted no new Consistorial Code, contenting themselves merely with declaring null all laws contrary to their religion. In all other respects the national canon law of Scotland was left untouched; and though several of its principles have since been altered or modified, it still remains the basis of the Scottish consistorial law.

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## CANVASSING.

*See* ELECTION LAW.

## CAPACITY.

*See* ALIENS; CONTRACT; HUSBAND AND WIFE; INSANITY;  
MARRIAGE; MINORS AND PUPILS; WILL; WITNESS.

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## CAPITAL PUNISHMENT.

*See* CRIME (PUNISHMENT).

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## CAPTION.

*See* DILIGENCE OF CREDITORS; IMPRISONMENT  
FOR DEBT.

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## CAPTION, PROCESS.

*See* PROCEDURE.

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## CARD SHARPING.

*See* CRIME.

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## CARGO.

*See* CARRIAGE BY SEA; INSURANCE (MARINE).



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